REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 19, 1972 and AUGUST 3, 1972

IN THE

Supreme Court of Nebraska

JANUARY TERM 1972

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H. EMERSON KOKJER

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1972

STATE OF NEBRASKA EX REL. SCHOOL DISTRICT OF HARTINGTON, ALSO KNOWN AS SCHOOL DISTRICT NO. 8, CEDAR COUNTY, NEBRASKA, APPELLEE, V. NEBRASKA STATE BOARD OF EDUCATION ET AL., APPELLANTS.

195 N. W. 2d 161

Filed February 25, 1972. No. 37942.

Schools and School Districts: Constitutional Law: Property: Contracts. It is not unconstitutional for a public school district to use or lease classrooms in a church or other sectarian building for public school purposes if the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellants.

Robert B. Crosby of Crosby, Pansing, Guenzel & Binning, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action by the School District of Hartington, Nebraska, to compel the Nebraska State Board of Education, and the Nebraska Department of Education, to approve its application for a grant of federal funds to

provide instructional activities and services to meet the special educational needs of educationally deprived children. The application, dated September 8, 1969, was made pursuant to the Federal Elementary and Secondary Education Act of 1965.

Because of a shortage of space in the buildings owned by the Hartington School District, the district entered into a lease with the Hartington Cedar Catholic High School for the use of one classroom full time and a second classroom half time. The lease provided that the classrooms would be used only for carrying on the project under the Federal Elementary and Secondary Education Act of 1965; that the Hartington School District would have full control over the classrooms and the educational program; and that no objects, pictures, or other articles having a religious meaning or connotation would be in the classrooms.

The defendants refused to approve the application because the project included the use of leased classrooms in the Hartington Cedar Catholic High School Building. This action followed.

The trial court found generally for the plaintiff and ordered the defendants to approve the application. The defendants appeal. The sole issue presented is whether the lease between the plaintiff and the Hartington Cedar Catholic High School is in violation of the Constitution of the United States and the Constitution of Nebraska. The particular provisions involved are the establishment clause of the First Amendment to the Constitution of the United States, and the prohibition against public aid to any sectarian or denominational school contained in Article VII, section 11, of the Constitution of Nebraska.

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The Constitution of Nebraska provides: "Neither the State Legislature nor any county, city or other pub-

lic corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof." Art. VII, § 11, Constitution of Nebraska.

The right of a public school district to use or lease all or a part of a church or other sectarian building for public school purposes has been upheld in a number of cases. As stated by the Supreme Court of Michigan in In re Proposal C, 384 Mich. 390, 185 N. W. 2d 9: "Premises occupied by lease or otherwise for public school purposes under the authority, control and operation of the public school system by public school personnel as a public school open to all eligible to attend a public school are public schools. This is true even though the lessor or grantor is a nonpublic school and even though such premises are contiguous or adjacent to a nonpublic school." See, also, State ex rel. Conway v. District Board, 162 Wis. 482, 156 N. W. 477; Dorner v. School Dist., 137 Wis. 147, 118 N. W. 353; Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669; Scripture v. Burns, 59 Iowa 70, 12 N. W. 760; Swadley v. Haynes (Tenn.), 41 S. W. 1066; Rawlings v. Butler (Ky.), 290 S. W. 2d 801, 60 A. L. R. 2d 285; Crain v. Walker, 222 Ky. 828, 2 S. W. 2d 654; City of New Haven v. Town of Torrington, 132 Conn. 194, 43 A. 2d 455; State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N. E. 2d 256.

If the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian, there is no constitutional violation. The lease in this case meets these requirements. We find no "excessive entanglement" between government and religion in the lease involved in this case. See Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697.

The defendants concede that it is not ipso facto un-

lawful for a public school district to lease property from a church-affiliated organization or institution for public school purposes. They attempt to raise a broader issue and challenge the "general constitutionality of the total educational program here involved." The defendants assert that it is unconstitutional for parochial school children to participate in an educational program under the federal act.

The federal act requires that educationally deprived children within the public school district who are enrolled in private schools be allowed to participate in the program. 20 U. S. C. A., § 241e (a) (2). Section 116.19 (b) of the federal regulations provides that the private school students' participation in the program shall be on a basis comparable to that of the children enrolled in the public schools. The defendants actually seek a declaration that the federal act itself is unconstitutional. See Barrera v. Wheeler, 441 F. 2d 795 (8th Cir.). Although that issue is not presented in this case, we believe it appropriate to make the following observations concerning the contention advanced by the defendants:

The Constitution of Nebraska specifically provides that no religious test or qualification shall be required of any student for admission to any public school. Art. VII, § 11, Constitution of Nebraska. It would seem that an attempt to prohibit a student enrolled in a parochial school from participating in a program conducted by the public schools, solely because the student was enrolled in a parochial school, would violate this provision of the Constitution of Nebraska.

The United States Supreme Court has, in the past, recognized a distinction between aid provided to parochial school students or their parents and aid provided to the school itself. In Everson v. Board of Education, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A. L. R. 1392, public transportation of nonpublic students was held constitutional. In Board of Education v. Allen, 392 U. S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060, the loan of school-

books for parochial school students was approved. In Earley v. DiCenso, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, and Robinson v. DiCenso, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, payment of a salary supplement to teachers of secular subjects in nonpublic schools was held invalid. In Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, reimbursement for teachers' salaries, textbooks, and instructional materials for secular subjects in nonpublic schools was held invalid. In Tilton v. Richardson, decided June 28, 1971, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790, Chief Justice Burger stated: "Our cases from Everson to Allen have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend." See, also, P.O.A.U. v. Essex, 28 Ohio St. 2d 79, 275 N. E. 2d 603.

The record shows that the classes which would be conducted by the Hartington School District in the leased classrooms would include both students enrolled in the public schools and students enrolled in nonpublic schools. It would seem that to deny a student the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school would violate that student's right to a free exercise of religion and to equal protection of the law. In re Proposal C, *supra*.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, C. J., dissenting.

Article VII, section 11, of the Constitution of the State of Nebraska provides: *"Neither the State Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the*

State or a governmental subdivision thereof." (Emphasis supplied.)

We have before us in this case the issue of whether federal aid extended under Title I of the Elementary and Secondary Education Act (hereinafter referred to as ESEA), Pub. L. 89-10, 79 Stat. 27 (1965), 20 U. S. C. 884 (Supp., 1965), is an impermissible violation in contravention of the above provisions of the Constitution of the State of Nebraska and the First Amendment to the Constitution of the United States. Broadly stated, the issue involved here centers around the historic constitutional requirement that government and religion remain separate, and in particular, whether the Constitution of the United States and the Constitution of the State of Nebraska permit public aid to sectarian schools.

At the outset, it should be made clear that what we are dealing with here is not simply a lease or an arrangement between a public and private school for the use of space or physical equipment in any building. The attempt to diminish or evade the issue before us in this case can be clearly exposed by a recital of how this case arose: Section 205(a), 79 Stat. 30, 31 (1965) states: "A local educational agency may receive a basic grant under this title for any fiscal year only upon application therefor approved by the appropriate State educational agency * * *." In hopes of securing a federal grant, the School District of Hartington, Nebraska, made application to the Director of Title I, ESEA, Nebraska State Department of Education, in the fall of 1969 for a Title I project to instruct qualifying students in remedial reading and remedial mathematics. The application's cover letter begins by stating, "Within our ESEA Title I project for fiscal year 1970, there has been included a Lease Agreement Contract between the Hartington Public School and Cedar Catholic High School of Hartington for facilities in which to conduct our Title I project * * *." The proposed project would have had the qualifying public and private school students attend remedial

reading and mathematics classes in two classrooms located in Cedar Catholic High School. Qualifying public and private school students would attend health and industrial arts classes in the public high school classrooms. Due to a shortage of classrooms in the public schools and the absence of any other practical location for the Title I programs, the School District "incorporated" the lease agreement into their Title I project for 1970.

Upon the appellants' refusal to approve the Hartington project, the School District of Hartington brought a mandamus action in the district court for Lancaster County. The School District sought to compel the appellants to approve the Hartington Title I project. The district court found that "the program for courses in remedial reading and remedial mathematics * * * including the use of leased classroom space for part of said program * * * does not violate the Constitutions of Nebraska, or the United States, and should be approved * * *."

One further word about the precise issue presented in this case. The weakness of appellee's position upon the state-church issue is apparent from the strenuous attempt throughout this litigation to constrict the issue to whether the lease of the physical classroom space from a parochial school is unconstitutional. We do not even need to peer through the form to see the substance of this scheme. It is apparent on the face of it. The lease does not stand alone at any time. It is included, it is true, in the overall Title I project application submitted by the School District, and although the lease was not directly related to the health and industrial arts classes that were to be held within the public school, the lease obviously is an integral part of the entire project. If nothing else, the lease was essential to the operation of the remedial reading and mathematics aspect of the project, and without the need to conduct remedial reading and mathematics classes there was no reason for the lease agreement. The only purpose of the application,

and the only purpose of the scheme, is to channel federal and state appropriated funds into the assistance of the education program of nonpublic schools, hopefully without getting involved in church-state questions. It is enough to say that the drafters of the ESEA in 1965, in attempting to weave their way through the United States Supreme Court's decisions dealing with the church-state issue, have set up a vaguely defined corridor through which funds may be channeled to assist nonpublic schools. For an analysis of this aspect of the act, see, Senate Rep. No. 146, 89th Cong., 1st Sess. (1965); Drinan, Reflections on the Implications of Title I of the Elementary and Secondary Education Act of 1965, 15 Cath. Law 179 (1969); Comment, the Elementary and Secondary Education Act of 1965 and the First Amendment, 41 Ind. L. J. 302 (1966); Feikens, The Elementary and Secondary Education Act - The Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I, 65 Mich. L. Rev. 1184 (1965).

Federal constitutional questions aside, I do not think it is an over-simplification to simply state that the answer to our problem in this case lies in the clear, unequivocal, unambiguous, and forceful language of our state Constitution. I repeat, it says: "Neither the State Legislature nor any county, city or other public corporation, *shall ever* make *any* appropriation from *any* public fund, or grant any public land *in aid of* any sectarian or denominational *school* or college, or any educational institution which is *not* exclusively owned and controlled by the state or a governmental subdivision thereof." (Emphasis supplied.) These words in our Constitution say what they mean and they mean what they say. They do not draw any distinction between sectarian or secular instruction, they do not permit any shadowy distinctions as to type of instruction, personnel of teachers, or any of the other distinctions and principles sought to be applied in the numerous cases under the First Amendment to the United States Constitution. Unde-

niably the grant of these funds requires state action. The application was to the state agency. ESEA requires specific authorization by the state. The State Board of Education is an arm of the State Legislature. Certainly nobody could argue that the proposed application and grant did not come squarely within the language of the "the State Legislature nor any county, city or other public corporation, *shall ever* make *any* appropriation from *any* public fund, or grant any public land *in aid of any sectarian,* * * *." The crucial fact in this case is the ESEA program, and the application filed herein by the Hartington School District requires a state agency to act and to make an appropriation, regardless of whether the funds are considered state or federal in nature. It is inconceivable to me, that, according to the dictates of Article VII, section 11, of the Constitution of the State of Nebraska, that this act of appropriation directly "in aid of" a sectarian school could be declared constitutional.

The State of Idaho has a constitutional provision almost identical to ours. In Epeldi v. Engelking, 94 Idaho 390, 488 P. 2d 860, the Supreme Court of Idaho, in striking down a provision for bussing parochial students, *under its state constitutional provision,* said as follows: "This section in explicit terms prohibits any appropriation by the legislature or others (county, city, etc.) or payment from any public fund, *anything in aid* of any church or to help support or sustain any sectarian school, etc. By the phraseology and diction of this provision it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. Had that not been their intention there would have been no need for this particular provision, because under Idaho Const. art 1, § 3, the exercise and enjoyment of religious faith was guaranteed (comparable to the free exercise of religion guaranteed by the First Amendment of the United States Constitution) and it further provides no person could

be required to *attend* religious services or *support* any particular religion, or pay tithes against his consent (comparable to the establishment clause of the First Amendment).

"The Idaho Const. art. 9, § 5, requires this court to focus its attention on the legislation involved to determine whether it is in 'aid of any church' and whether it is 'to help support or sustain' any church affiliated school. The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute, both the 'child benefit' theory discussed in Everson v. Board, supra, and the standard of Board of Education v. Allen, supra, i. e., whether the legislation has a 'secular legislative purpose and a primary effect that neither advances nor inhibits religion.' In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. Art. 9, § 5."

We need inquire no further. It is clear that the scheme and plan involved in this case goes much further than mere bussing, because it provides for direct payments of money to assist the education of secular or private school students. The overwhelming authority from states with similar state constitutional provisions is to the same effect. See, Matthews v. Quinton, 362 P. 2d 932 (Alaska, 1961); Epeldi v. Engelking, *supra;* Spears v. Honda, 51 Hawaii 1, 449 P. 2d 130 (1969); Opinion of the Justices, 216 A. 2d 668 (Del., 1966); State ex rel. Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N. W. 2d 761 (1962); Judd v. Board of Education, 278 N. Y. 200, 15 N. E. 2d 576, 118 A. L. R. 789 (1938).

We turn now to the issue, which is before us, under

the First Amendment to the United States Constitution. First, it seems to me that the United States Supreme Court in Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), had held that the Everson case, permitting school bussing, was the trail's end with regard to what is not aiding in the establishment of religion. In that case, the court pointed out that the "verge" reached in Everson had "become the platform for yet further steps," leading to dangerous developments of federal constitutional theory. In my opinion, the principles and rationale of Lemon v. Kurtzman, *supra,* is decisive of the issue here in the present case. Lemon was a grouping of three state school aid cases, and the Supreme Court applied the "entanglement" test which it had formulated in Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). The court said: "* * * the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." The court held two statutory school aid plans unconstitutional under the religion clauses of the First Amendment since both plans involved excessive entanglement of church and state even though both promoted secular legislative purposes. The opinion of Chief Justice Burger stressed the divisive political potential of both state programs, "one of the principal evils against which the First Amendment was intented to protect."

I can see no difference, in principle, between the Lemon case and the case we have before us. Although the Lemon case deals with state statutory aid programs to nonpublic schools, it seems clear that the present case is directly analogous and that the ESEA program with state required action, has the same "self-perpetuating and self-expanding propensities which provide a warning signal against entanglement between government and religion." See Lemon v. Kurtzman, *supra.*

We must remember that the prohibition of religious entanglement under the First Amendment is a two-edged sword. The Supreme Court of the United States spelled this principle out clearly in School District of Abington Township v. Schempp, 374 U. S. 203, 259, 83 S. Ct. 1560, 1591, 10 L. Ed. 2d 844 (1963). What it said is as follows: "* * * government and religion have discreet interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

It would seem that the question under the federal Constitution involved in this case has been resolved in Sanders v. Johnson, 403 U. S. 955, 91 S. Ct. 2292, 29 L. Ed. 2d 865, where the Supreme Court of the United States, subsequent to the opinion in Lemon, affirmed a lower federal court decision involving a Connecticut state statute authorizing the state to contract with parochial schools for the purchase by the state of secular educational services for the parochial schools. The Supreme Court affirmed the holding of the lower court that such a statute was unconstitutional. The lower federal court, in Johnson v. Sanders, 319 F. Supp. 421 (1970), prior to the decision in Lemon, and apparently anticipating it, said as follows: "The State could not itself maintain an educational establishment providing secular classes closely integrated with religious instruction, symbols, and observances—even if the latter were the sole responsibility of private groups—in the same buildings during regular school hours. * * * even if a state does not itself formally maintain a school which teaches religion or applies sectarian admission standards, a law may specify types of public identification and involvement with such a school which cause an 'excessive government entanglement' with the religious

aspects of the institution, thereby advancing or inhibiting religion. * * * A constitutional funding measure requires not just artful legislative language, but also the creation of an administrative mechanism through which government may restrict its spending to a readily identifiable secular educational function without 'continuing surveillance leading to an impermissible degree of entanglement.' "

In summary, it seems to me, over and beyond the other reasons touched on in this dissent, that this act, this scheme, this procedure requires that the state will be amidst the daily affairs of a religious school. It must be remembered that we are not dealing with something as simple as a bus ride, or a textbook, or a mere lease agreement; we have here an innovative program of noble purpose and it carries with it those highly feared risks of conflict and divisiveness which history has shown follow any close proximity between government and religion.

If this statute, and the state action asked to be taken under it, is constitutionally permissible, then I see no obstruction or impediment to the state and the federal government taking complete and literal control of the contracting schools and making their entire secular curricula part of its public system for all purposes, including the hiring of teachers, the renting of the physical facilities, and perhaps the admission of students. Such action plainly runs afoul of the state and federal Constitutions. We must remember that the real test of constitutionality is not what is actually done under the act but what the act authorizes.

The act and the scheme here, in my opinion, are the beginning of the possible creation of state financed, and therefore extensively state regulated, entanglement in sectarian school affairs. The state, in order to comply with the federal act, is required to set up a "partition" between the secular and religious activities of parochial schools and to take substantial responsibility for

the secular portion of parochial school students' education. I am firmly of the opinion that this runs afoul of the basic principle of the establishment clause test in the federal Constitution that neither the federal government nor the state can engage in legislation or action which advances or inhibits religion.

SPENCER, J., joins in this dissent.

McCOWN, J., concurring.

I concur in the majority opinion. This is not the case in which to belabor unconstitutional church-state bogeymen. This case involves the lease of two classrooms in a parochial school by a public school district for the purpose of conducting classes under a federally funded special education services program for all public or private school pupils having need of it. The dissenting opinion misconceives the law and the facts. The dissent states: "The only purpose of the application, and the only purpose of the scheme, is to channel federal and state appropriated funds into the assistance of the education program of non-public schools * * *." That is simply not so. The special education services provided under the Act involved here are available to pupils of public schools and also to pupils of parochial and other non-profit private schools, and the entire program is under the direct supervision and control of the public school.

The dissent relies heavily upon Sanders v. Johnson, 403 U. S. 955, 91 S. Ct. 2292, 29 L. Ed. 2d 865, in which the Supreme Court of the United States affirmed a federal court decision involving a Connecticut statute. The dissent quotes extensively from the lower federal court case reported at 319 F. Supp. 421. The dissent, however, fails to note that the Johnson case quite clearly approved special education services of the kind involved here. In discussing the previous state policies and programs which the court approved, the court in that case stated: "The State made bus transportation, health and welfare services, and special education services available

to students attending parochial and other non-profit private schools; * * * it was never supposed that these limited state activities constituted public control, endorsement, or 'promotion' of the secular education provided independently by parochial schools. Cf. Board of Education v. Allen, supra; Everson v. Board of Education, supra. The State gave aid to parochial school students and even extended some funds through a program for driver instruction and highway safety administered by their schools; but the only secular education 'promoted' with governmental endorsement was offered by the public schools." The court then stated that the state act it held unconstitutional had "sharply altered" that former relationship between the State of Connecticut and its parochial schools and their students.

The dissent also relies heavily upon the case of Epeldi v. Engelking, 94 Idaho 390, 488 P. 2d 860. It need only be noted that in that case a direct state appropriation under a state statute was involved, and even in that connotation, the case represents a definite minority viewpoint.

The dissent here flatly asserts that the constitutional language of "any appropriation from any public fund * * * in aid of any sectarian or denominational school * * *" neither requires nor permits any interpretation whatever. It then proceeds to interpret it to mean that regardless of the primary public purpose, any appropriation from any public fund which results in or produces a direct or indirect benefit for any non-public educational institution or for its pupils is automatically unconstitutional. This is a distortion of the language and the underlying broad assumption is flatly contradicted by every Supreme Court case to date. If the dissent be correct, the State of Nebraska could not even appropriate funds to purchase or lease equipment or a building from a non-public educational institution for the exclusive use of the public school.

It is interesting to note that the federal act involved

here became law in 1965 by act of Congress. Seven years have now passed, and we are unable to find a single court decision, state or federal, which has yet held that act unconstitutional under the federal or any state constitution. If the opinion expressed in the dissent were to become the opinion of this court, it would be the first time in history for a state court to declare a federal act unconstitutional because the federal funds were channeled through a state controlled distibution agency.

The constitutional issues posed by church-state relationships are complicated and difficult of resolution. Nevertheless, the leasing of classrooms by a public school district from a parochial school for furnishing special education services for both public and parochial school pupils with funds provided by the United States government does not raise those issues.

CLINTON, J., joins in this concurrence.

NEWTON, J., concurring in part and dissenting in part.

I concur in part, and dissent in part, with the majority opinion.

The Elementary and Secondary Education Act of 1965 is an Act of Congress which provides public funds for certain educational purposes. See United States Statutes at Large, Vol. 79, p. 27. The Act, as subsequently amended, will be found in Title 20, U. S. C. A., § 241a et seq. A reading of the Act makes it clear that the funds provided may be allotted *only* to *free public* elementary or secondary schools. This necessarily bars, as recipients, all private and parochial schools. See Title 20, U. S. C. A., § 244 (6B). See, also, § 241e (a) (3), which provides: "* * * that the local educational agency has provided satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property; * * *."

Section 244 (6) (B), provides: "For purposes of subchapter II of this chapter, the term 'local educational

agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools."

It is clear that the intent of the Act is not to provide funds for private schools but to permit students in private schools to benefit by enrolling in classes conducted by, and under the auspices of, public schools.

There is nothing in the Act which can raise a constitutional question in regard to the appropriation of funds for private or parochial schools.

The only remaining question is in regard to the manner in which it is proposed to use the federal funds in this instance. Insofar as the expenditure of public funds, even though derived from federal sources, by the State, or a governmental subdivision of the State, is concerned, the State Constitution must be complied with. In such case, the manner in which the funds are to be used is pertinent. Services educational in nature, rendered to a sectarian school, are forbidden. On the other hand, services dealing basically with the public health and safety would appear to be legitimate. See In re Proposal C, 384 Mich. 390, 185 N. W. 2d 9.

The entanglement of church and state is, in this instance, minimal in nature. The leasing of property from a sectarian school is not necessarily forbidden. However, if the underlying theory advanced in the majority opinion is pursued to its logical conclusion, the school district could dispose of its public school building and lease sufficient space in the sectarian school to teach *all* secular school subjects. It could then teach these subjects to both public and parochial students, notwithstanding a portion of the building was retained for religious educational purposes. This appears to be di-

rectly violative of the principles enunciated in Johnson v. Sanders, 319 F. Supp. 421, affirmed without opinion in 403 U. S. 955, 91 S. Ct. 2292, 29 L. Ed. 2d 865.

WHITE, C. J., and SPENCER, J., responding to concurrence.

The concurring opinion makes the broad statement that the dissenting opinion misconceives the law and the facts. This position is buttressed by nothing more than a broad statement of the purpose of the act and its availability to all students. Whether or not this statement of purpose would save the act from being declared unconstitutional on its face is not the question before us. The problem is what the act actually authorizes and what the application in fact seeks to do. We reiterate, rhetoric aside, that the application seeks State approval and consent to the funding and spending of public tax money to furnish secular educational facilities and instruction to parochial school students within their own parochial school building. It is quite inconceivable to us that such an application, requiring public school teachers to teach parochial school students secular subjects in the confines of a parochial school building, does not raise constitutional questions of the most serious nature. The point is that the constitutionality of any "special educational" program will necessarily depend upon the nature of the particular application and what it seeks to accomplish. In our opinion, the authorization of "pocket schools" as this application and this act envision is contrary to the basic provisions of the Constitution of the State of Nebraska and the federal Constitution with reference to the separation of church and state. The concurring opinion utterly fails to answer the questions of entanglement involved in this scheme and its execution, questions that exist no matter how efficient it may be claimed this program is in promoting the secular education of parochial school children. It utterly fails to answer the argument that the execution of this program in this application under the broad language

of the federal program results in an aid to religion, because it is obvious that the provision for funding and providing instruction and education in secular subjects reduces the education cost and necessarily frees money and benefits for use for the particular religious purposes of the parochial school. We also reiterate our previous position that the law of separation of church and state, erected by our Constitution makers as one of the most fundamental principles of our government, was directed not only at religious penetration or intrusion into public education and the expenditure of public funds, but thrusts equally strong to prevent governmental or state penetration or intrusion into the freedom of parochial schools to conduct their religious program of education free of any restraints, inhibitions, or controls by the state or the federal government.

The concurring opinion also states the Epeldi v. Engelking, 94 Idaho 390, 488 P. 2d 860, "represents a definite minority viewpoint." We feel that this statement simply cannot be supported. Even with respect to the issue of bussing, following the Everson case, the majority of states have rejected Everson and have barred transportation at public expense of children attending nonpublic schools. In Reutter and Hamilton, The Law of Public Education, p. 15 (Foundation Press, 1970), the following statement is made with reference to state court interpretation of state constitutions after Everson: "In subsequent years the highest courts of several states have considered the issue in light of their respective state constitutions. As of the end of 1969, more had rejected than accepted the reasoning of the majority in Everson and had barred transportation at public expense of children attending non-public schools."

It hardly needs repetition that the issue involved in the physical transportation of students is far different than the issue we have before us here, namely, the intrusion of public funds into the actual teaching and instruction of parochial and public school students.

We further call attention to our previous decision in State ex rel. Public School District v. Taylor, 122 Neb. 454, 240 N. W. 573 (1932), where this court was asked to command that public funds be paid over to a parochial high school in Cedar County, Nebraska, which is precisely what is being asked in the case at bar. After finding that the school was obviously parochial and therefore without the definition of a public or common school, this court concluded that our state Constitution, citing Article VII, sections 3 to 9, Article VII, section 11, and Article I, section 4, would not allow the court to "require the state superintendent of public instruction to apportion part of the interest and income from the state common school trust funds to a school *in part* sectarian - a school which is not a common or public school within the meaning of the Constitution." (Italics supplied.) In other words, the court rejected the notion that the use of public funds to teach secular subjects in a sectarian school was constitutional. To sum it up, it seems to us that the opinion of the majority in this case is authorizing the creation of an unconstitutional dual school system. There is no reason to believe that public support of the parochial school in Cedar County will end with one and one-half rooms and the teaching, by public school teachers, of a limited group of "secular" subjects.

It is stated that we have made an incorrect analysis of Johnson v. Sanders, the latest pronouncement on the subject. We note that the dissent mentioned the Johnson case only as it aided in the dissent's analysis of the entanglement issue presented in this case. The criticism from the concurrence does not deal in any nature whatsoever with the entanglement issue and the issue of political divisiveness, issues which we think are fundamental to the disposition of this case. However, in going further, the concurrence does state that the Johnson case "clearly approved special education services of the kind involved here." This statement is simply wrong. The reading of the Johnson opinion shows that the State

of Connecticut did finance "secular education provided independently by parochial schools." Unlike our situation here, there were only a minimum of state regulations as to the operation of the secular courses, and it was not the situation as it is here where there is to be a "pocket" public school within the physical confines of a private school. The defect in the new program which Johnson declared unconstitutional was *exactly* that which we have here, namely, governmental promotion and complete control of secular educational activities *within* private institutions; "The State itself assumes responsibility for providing instruction in certain courses at parochial as well as at public schools." The Johnson opinion, as we have pointed out, exhaustively exposes the entanglement and the political divisiveness of this intermingled situation.

In the Johnson case, the court compared the prior form of state aid to the newly enacted statutory plan, thus presenting the same issue we have here. The distinction between the Johnson case and the case we have here is a hairline at the most. It is this very type of hairline distinction which the thrust of Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and the other cases seek to forbid. In the Johnson case, it is stated: "The primary effect of the type of 'promotion' prescribed would be much more extensive, transforming a unitary public school system into a dual one which partially incorporates participating private schools as its administrative *appendages*." The divisiveness and the entanglement may be stated as follows: Will a Cedar County Catholic High School become a common school or will we have a dual system, public and "pocket" public?

There is another aspect of the Johnson case which was not previously mentioned in the dissent. The Connecticut statute in question in Johnson provided for the support of "any or all secular instruction at contracting schools." Because of the potential of having the state

administering the entire secular portion of the private school's instructional program, the court recognized the problem of government's influence being so great that "state action" is created; i.e., the private school becomes an arm of the state and the state can be charged *with the private school's traditional discriminatory practices in admissions.* Apart from that the court in Johnson noted that "it would infringe all taxpayer's First Amendment rights to be assured that their money is not used to sponsor an institution which simultaneously teaches religion or applies selective religious standards." In the case at hand, only a portion of secular instruction is controlled by the state, but coupled with the fact that the state is to have a leasehold interest in the property, the parochial school may become an arm of the state. See Burton v. Wilmington Parking Authority, 365 U. S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45.

In closing this response, we call attention to the recent case of State ex rel. Chambers v. School Dist. No. 10 of Deer Lodge County, 472 P. 2d 1013, a Montana case. This case is almost directly in point with the case at bar. In that case the court held that their state Constitution prohibited public school boards from making levy for, or expending funds for the employment of teachers to teach in a parochial school, following the authority contained in a specific state statute. The state constitutional provision in Montana is almost in haec verba with the one in Nebraska. It states as follows: "Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever."

In striking down the school board levy for the employment of teachers to teach secular subjects in a parochial school, the court said: "The Chief Justice proceeded to point out (Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697) the dangers of such a course in these words: 'The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.' " The Montana court, in rejecting the argument that is made in the concurrence here, that our State Constitution is open to interpretation, said as follows: "Returning to Section 8 of Art. XI, it cannot be asserted that this section is ambiguous or indefinite and thereby open to interpretation since it clearly states in no uncertain terms that no school district can directly or indirectly appropriate or pay from public funds to aid the support of any school controlled in whole or in part by any church, sect or denomination. While it was argued to the contrary by the appellants, that such section could be interpreted to support their theory of this case, we cannot accept such argument."

STATE OF NEBRASKA, APPELLEE, V. FREDDIE MINOR, APPELLANT.
195 N. W. 2d 155

Filed February 25, 1972. No. 38204.

1. **Criminal Law: Trial: Evidence: Drugs and Narcotics: Controlled Substances.** The burden of proof of exceptions within the ambit of the Depressant and Stimulant Drugs Act is on the party attempting to bring himself within the exceptions.
2. **Criminal Law: Witnesses: Husband and Wife: Evidence.** A wife's incompetency in criminal proceedings against her husband is

to be limited to testimonial utterances. She is competent to supply information for a presentence report.

3. **Criminal Law: Sentences: Evidence: Reports.** A sentencing judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. He may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of the defendant.

4. ———: ———: ———: ———. Modern concepts individualizing punishment have made it necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

J. William Gallup of Schrempp & Bruckner, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This appeal by defendant, Freddie Minor, from his conviction on a charge of possession of a depressant drug, presents only questions of law. As phrased by the defendant, they are as follows: "1. Whether the prosecution has the burden of proving the defendant does not come within the exceptions in a criminal statute. * * * 2. Whether a judge at the time of sentencing can consider hearsay statements of the defendant's wife which are in the pre-sentence report." We affirm.

Defendant, relying on United States v. Vuitch, 402 U. S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601 (1971), contends that in a criminal prosecution based on a statute which contains exceptions, the burden is on the prosecution to plead and prove that the defendant is not within an exception. The alleged offense was committed on

November 28, 1970. Prosecution was commenced under the Depressant and Stimulant Drugs Act, which provided, so far as material herein, the following exceptions: "No person, other than a person described in section 28-497 or 28-498 shall possess any depressant or stimulant drug unless (1) such drug was obtained upon a valid precription and is held in the original container in which such drug was delivered; or (2) such drug was delivered by a practitioner in the course of his professional practice and the drug is held in the immediate container in which such drug was delivered." § 28-499, R. S. Supp., 1969.

The defendant was found to be in possession of 75 red capsules commonly identified as "red devils," which contained secobarbital. The trade name of the drug is "seconal," which contains secobarbital as a salt of barbituric acid. These capsules were found in a plain 2 inch by 3 inch manila envelope. It strains credulity to believe this would be an original container in which such drugs were legally dispensed. As to whether the drugs were delivered on a legal prescription, this fact would be peculiarly within the defendant's knowledge. If they were within the original container, that container would undoubtedly have a number identifying the prescription. It is not illogical to observe that 75 capsules would be an unusually large number for a legal prescription of a depressant or stimulant drug.

United States v. Vuitch, *supra,* involved an abortion statute. The issue there was which party had the burden to prove the abortion was or was not necessary to preserve the life or health of the mother. The court held placing the burden on the doctor who performed the abortion was inconsistent with the social idea of the responsibility of the medical profession. Doctors by their own professional standards are expected to give such treatment as is necessary to preserve a patient's health. Therefore, the burden was on the prosecution to plead and prove the abortion was not necessary for the preser-

vation either of the mother's life or health. The Vuitch case patently is not persuasive in those instances where the necessary facts are peculiarly within the knowledge of the defendant.

It is impossible to state a comprehensive general rule on the burden of proving exceptions for all cases. As suggested in 9 Wigmore on Evidence (3d Ed.), Burden of Proof, § 2486, p. 275: "* * * the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false. This principle has received frequent application in modern statutes making it an offense to pursue a certain occupation without a State license or forbidding a certain act unless in personal circumstances justifying an exception."

The rule has long been settled in Nebraska. In State v. Krasne, 103 Neb. 11, 170 N. W. 494, we held: "In a criminal prosecution, if a negative is an essential element of the crime, and is 'peculiarly within the knowledge of the defendant,' it devolves upon him to produce the evidence, and upon his failure to do so, the jury may properly infer that such evidence cannot be produced."

When the facts relating to an exception in a criminal statute are difficult for the State to obtain and are at the same time peculiarly within the knowledge of the defendant, the question should be considered as a defense or justification and not as a part of the description of the offense itself, so as to impose upon the State the burden of proof to establish the fact that the defendant is not within the exception. We find the burden of proof on exceptions within the ambit of the Depressant and Stimulant Drugs Act is on the party attempting to bring himself within the exceptions.

Defendant's second point is premised on the contention that his wife's incompetency to testify against him at the trial extends to supplying information for a presentence report, and inferentially attacks the hearsay

character of such reports. Defendant cites no authority for his contention.

The modern trend is to restrict or to abolish the privilege, as some courts have done. As noted in 8 Wigmore on Evidence (McNaughton Rev. Ed., 1961), Anti-marital Facts, § 2235, p. 234: "* * * no court ought today to lend its sanction to any expansion of the limits of this undesirable rule of privilege, and there is at least ample authority for the most rigid restriction."

We construe a wife's incompetency in criminal proceedings against her husband to be limited to testimonial utterances. She is competent to supply information for a presentence report.

In State v. Rose, 183 Neb. 809, 164 N. W. 2d 646, we said: "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowing a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue."

Due process is not violated by the Nebraska procedure. This is definitely a universal practice, as evidenced by the following from Williams v. New York, 337

U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949): "* * * both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. * * * A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

There is no merit to defendant's assignments of error. Judgment affirmed.

AFFIRMED.

McCOWN, J., concurring.

I concur in the opinion here on the facts of this case. It should be emphasized that the "burden of proof" of exceptions does not fall on a defendant until the State has first established a prima facie case. The cases following the rule of placing the "burden of proof" of exceptions on the defendant almost without exception reveal facts which demonstrate that the State had first established a prima facie case of unlawfulness. Here the evidence as to the defendant's possession clearly and almost overwhelmingly established the fact that the defendant's possession was presumptively unlawful.

The opinion here was not intended to remove the State's burden of proving a defendant guilty and instead place the burden upon a defendant to establish his inno-

cence. At the same time, in the absence of any explanatory statement, it might well be interpreted to mean that all the State was required to do was to prove possession of a controlled substance, without any reference to whether the evidence and circumstances did or did not indicate that the possession was pursuant to a valid prescription. If possesion alone were enough, then proof that a defendant had a controlled substance in a bottle on his person with his name and that of a pharmacy on the label would be sufficient to convict him if the defendant could not or did not produce any evidence. The number of citizens who have knowing possession of a controlled substance under a lawful prescription is many times greater than the number who hold such substances unlawfully without a valid prescription. Under such circumstances, it would be wholly unrealistic to place on every citizen the burden of proving that he has a valid prescription until the State has produced at least enough evidence as to the circumstances of the possession to raise a presumption that the possession was unlawful.

As long ago as 1934, Mr. Justice Cardozo said: "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664.

The Nebraska Jury Instructions, NJI No. 14.05, approved by this Court, states in part: "The burden of proof is always on the state to prove beyond a reasonable doubt all of the material elements of the crime

charged, and this burden never shifts."

Once the State has met its initial burden of establishing a prima facie case, the defendant must then bear the burden of coming forward with the evidence to establish that he comes within an exception provided for by the drug control statutes.

BOSLAUGH and CLINTON, JJ., join in this concurrence.

SUZANNE N. DWYER, APPELLEE AND CROSS-APPELLANT, V. OMAHA-DOUGLAS PUBLIC BUILDING COMMISSION ET AL., APPELLANTS AND CROSS-APPELLEES, DANIEL C. LYNCH, INDIVIDUALLY, INTERVENER-APPELLEE.

195 N. W. 2d 236

Filed February 25, 1972. No. 38299.

1. **Constitutional Law: Legislature.** The Legislature has plenary legislative authority limited only by the state and federal Constitutions.
2. **Constitutional Law.** The language of the Constitution is to be interpreted with reference to the established laws, usages, and customs of the country at the time of its adoption.
3. ———. The Constitution must be read in connection with the facts of history and the development of a representative form of government.
4. ———. The Constitution as amended must be construed as a whole.
5. **Constitutional Law: Legislature: Courts.** Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight.
6. **Legislature: Municipal Corporations: Public Building Commissions.** The Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility.
7. **Constitutional Law: Taxation.** The power to tax being a sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to the government, but are merely limitations on a power which would otherwise be unrestricted.
8. ———: ———. Constitutional limitations on the power to tax must be strictly construed.

9. **Constitutional Law: Legislature: Statutes.** In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality.
10. **Constitutional Law: Taxation: Counties: Public Building Commissions.** The one-half mill levy made by the Omaha-Douglas Public Building Commission under the authority of L.B. 1003, Eighty-second Session of the Nebraska Legislature, is not a county tax subject to the provisions of Article VIII, section 5, Constitution of Nebraska.
11. **Constitutional Law: Taxation: Municipal Corporations: Public Building Commissions.** The one-half mill levy authorized to be made by cities of the metropolitan class for the purposes of L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not contravene the Omaha city charter adopted under the provisions of Article XI, section 5, Constitution of Nebraska.
12. **Constitutional Law: Counties: Municipal Corporations: Public Building Commissions.** L.B. 1003, Eighty-second Session of the Nebraska Legislature, which enabled cities of the metropolitan class and the county in which such city is located to create a public building commission authorized to furnish facilities for the joint use of the city and county pertains to a matter which is of state concern and not just to a strictly municipal affair.
13. **Constitutional Law: Statutes.** L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not amend either section 23-119, R. R. S. 1943, or section 23-120, R. S. Supp., 1971, and therefore does not violate Article III, section 14, Constitution of Nebraska.
14. **Constitutional Law: Statutes: Legislature: Courts.** The power of classification rests with the Legislature, and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation.
15. **Constitutional Law: Statutes.** L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not contravene the provisions of Article III, section 18, Constitution of Nebraska.
16. ———: ———. L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not contravene the provisions of Article IX, sections 2, 4, or 5, Constitution of Nebraska.
17. **Constitutional Law: Public Building Commissions.** A building for governmental purposes is not a work of internal improvement under the provisions of Article XIII, section 2, Constitution of Nebraska.
18. **Constitutional Law: Municipal Corporations: Taxation: Public**

Building Commissions. The tax authorized to be levied by a city of the metropolitan class under the provisions of L.B. 1003, Eighty-second Session of the Nebraska Legislature, is not a tax for corporate purposes and is one levied by local authority and does not contravene Article VIII, section 7, Constitution of Nebraska.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed in part, and in part reversed and remanded.

Donald L. Knowles, James M. Murphy, Harold M. Zabin, Herbert M. Fitle, Frederick A. Brown, and Verne W. Vance, for appellants.

McGrath, North, Nelson, Shkolnick & Dwyer, for appellee.

August Ross, for intervener-appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Plaintiff, a taxpayer in Douglas County, Nebraska, and in the City of Omaha, brings this action on behalf of herself and others similarly situated to challenge the constitutionality of L.B. 1003 enacted by the Eighty-second Legislature, sections 23-2601 to 23-2612, R. S. Supp., 1971. L.B. 1003, hereafter referred to as the act, pertains to cities of the metropolitan class, the population of which is more than half the population of the county in which the city is located, and likewise pertains to such counties. It authorizes the county and city to initiate proceedings for the establishment of a building commission which is a "body politic and corporate and an instrumentality of the state." The act provides that the commission shall have a governing body of five appointed as provided therein and authorizes the commission to acquire in the "name of the city and county, by gift, grant, bequest, purchase or condemnation real property"; to annually levy a tax "for the pur-

poses of the commission not to exceed one half mill on the dollar upon the assessed valuation of all the taxable property in the county"; and to issue bonds which are the general obligation of the commission but not of the state, city, or county. The underlying purpose of the act is expressed in the following language: "The purpose of sections 23-2601 to 23-2612 is to provide a means whereby buildings, structures and facilities can be acquired, constructed, remodeled or renovated and financed for use jointly by such cities of the metropolitan class and the respective counties in which they are located." § 23-2601, R. S. Supp., 1971.

The act grants the commission certain corporate powers, for example, to sue and to be sued; to acquire, hold, and dispose of property; and to make by-laws and regulations for the management of its affairs and the use of its projects. It authorizes, with the consent of the city and county, use of their facilities, agents, and employees, and authorizes the commission to reimburse the city and county for such use. It authorizes agreements with the city or county or both as to the operation, maintenance, repair, and use of the property; it authorizes with the consent of the city and county agreements with various governmental entities state and federal for use of the projects; and it grants to the commission power of eminent domain. The authority of the commission to issue bonds requires prior approval of the city and county. The act also provides: "The full faith and credit of the commission shall be pledged to the payment and security of the bonds and notes issued by it, whether or not such pledge shall be set forth in the bonds or notes. So long as any of its bonds or notes are outstanding, the commission shall have the power and be obligated to levy taxes within the limitation as provided in section 23-2604 to the extent required, together with any other money available to the commission therefor to pay the principal of and interest and premium, if any, on such bonds and notes as the same

become due and payable. . . . The bonds, notes, obligations or liabilities of a commission shall not be a debt of the State of Nebraska or of the city or county for which the commission is established and neither the state, city, nor the county shall be liable thereon or therefor, nor shall such bonds, notes, obligations or liabilities be payable out of any money other than the money of the commission issuing or incurring the same." The act contains many other provisions, some of which will be noted as this opinion proceeds.

Pursuant to the provisions of the act the county board of Douglas County enacted a resolution activating the Omaha-Douglas Public Building Commission and appointed two members of the commission. The mayor of Omaha, with the approval of the city council, appointed two members and the four members appointed the fifth. On July 8, 1971, the commission levied, pursuant to the provisions of the act, a one-half mill tax on all taxable property in the county.

The case was tried on stipulation of facts, reference to which will be made as necessary. It was stipulated that for the 1971-72 fiscal year the mill levy for Douglas County is at the constitutional limit and if the levy made by the commission is includable in the county levy then the total county levy is in excess of the limitation provided by Article VIII, section 5, Constitution of Nebraska, which is as follows: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valuation as determined by the assessment rolls, except for the payment of indebtedness existing at the adoption hereof, unless authorized by the vote of the people of the county."

The district court determined the levy by the commission was in effect a levy for county purposes and therefore in excess of the constitutional limit and void. It enjoined the commission from expending, pending final disposition of the case, any funds which may be

raised by the one-half mill levy. The trial court found in all other respects the act was constitutional. The defendants appealed. The plaintiff cross-appeals and claims the act is unconstitutional in toto contending, as she did in the trial court, the act is in violation of the following constitutional provisions, to wit, Article I, section 26; Article III, sections 14 and 18; Article VIII, sections 5 and 7; Article IX, sections 2, 4, and 5; and Article XIII, section 2, Constitution of Nebraska.

The necessity or wisdom of the legislation is not for this court to determine. We only determine whether it contravenes some constitutional provision which renders it invalid in whole or in part. We first determine the correctness of the trial court's decision on the issue raised on the main appeal and then we will examine the questions raised in the cross-appeal.

The briefs of counsel are able and exhaustive. Counsel for all parties cite authorities which seem directly applicable or applicable in principle and, in our judgment, support their respective contentions on the issues raised on the main appeal and on which the trial court rested its decision. We, however, examine these authorities and make our decision in the light of what we deem the pertinent provisions of the Nebraska Constitution and certain pertinent general principles of constitutional interpretation previously announced by this court.

The Appeal

Article VIII, section 5

The constitutional provisions which must be considered are Article III, section 1; and Article VIII, sections 1 and 5. Article III, section 1, vests the complete legislative authority of the state in the Legislature subject only to the rights of initiative and referendum reserved by the Constitution to the people, and, of course, subject to any specific restrictions on the legislative authority found in the Constitution itself. The appellee contends that as applied to the facts of this case Article VIII, section 5, which we have previously quoted, is such a spe-

cific restriction. Article VIII, section 1, provides in part as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct."

There can be no doubt, of course, that the Legislature cannot authorize the counties to levy taxes in excess of the constitutional maximum set by Article VIII, section 5. The appellee argues the act does exactly that by indirect means and that the commission is merely the " 'alter ego' of the city and the county," a legistive creation established "solely to circumvent the county's constitutional tax limitation."

The decision we reach is arrived at in the light of the following principles and the three constitutional provisions hereinbefore cited. The Legislature has plenary legislative authority limited only by the state and federal Constitutions. Swanson v. State, 132 Neb. 82, 271 N. W. 264; Albuquerque Met. Arroyo Flood Con. A. v. Swinburne, 74 N. M. 487, 394 P. 2d 998. The language of the Constitution is to be interpreted with reference to the established laws, usages, and customs of the country at the time of its adoption. The Constitution must be read in connection with the facts of history and the development of a representative form of government. The Constitution as amended must be construed as a whole. Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1. The Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility. Neal v. Vansickle, 72 Neb. 105, 100 N. W. 200. The power to tax being a sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to the government, but are merely limitations on a power which would otherwise be unrestricted. Constitutional limitations on the power to tax must be

strictly construed. Ryder v. Livingston, 145 Neb. 862, 18 N. W. 2d 507, 159 A. L. R. 458.

In the Constitution of 1866 the legislative authority of the state was vested in the Legislature without any reservation to the people of either initiative or referendum. It contained no provision whatever with reference to the counties. It mentioned no municipal or quasi-municipal corporations save cities and incorporated villages, and with reference thereto directed the Legislature to make provision for their organization by general law and to restrict the power of taxation "to prevent the abuse of such power." Counties were apparently already in existence pursuant to territorial law. In 1873, the Legislature confirmed the boundaries of these and created others. It likewise made provision for the government of counties and made provision defining the powers and duties of counties and their officers. The powers granted were minimal corporate powers. It also made provision for courts and law enforcement, taxation and collection of taxes, laying out of roads, and the keeping of real estate records. It authorized the counties upon a vote of the people to issue bonds to aid in boring for coal in their respective counties. Among the specific powers was the following: ". . . and in case there are no county buildings, to provide suitable rooms for county purposes." G.S. 1873, p. 234.

A constitutional limitation on the power of county authorities to tax first appeared in the Constitution of 1875. Art. IX, § 5. Previous limitations were statutory only. At that time also appeared limitations on the power of the Legislature to change county boundaries and to create counties. Prior to the 1920 revision of the Constitution the inhibition on the county tax read: ". . . shall never assess taxes . . . which shall exceed one and a half dollars per one hundred dollars valuation . . . ." Questions arose as to whether the valuation referred to was actual value or assessed value. See

Constitutional Convention 1919-1920, Proposed Amend. to Art. 9, § 5, p. 32. This was clarified and defined in the 1920 constitutional revision in its present form.

In all the years intervening between 1866 and the present, the Legislature has at will added to the powers and duties of the counties and from time to time taken away certain powers, but mostly it has added functions or duties. A comparison of the pertinent statutory provisions in the General Statutes of 1873, Compiled Statutes of 1922, and Revised Statutes of 1943, readily illustrates these points. Counties could also exercise under statutory provisions some of the same functions as other subdivisions and within the same territory. For example, the laws of 1873 authorized the commissioners at their discretion to build or repair bridges within the limits of any town or city in the county. The county at times could improve city streets. G.S. 1873, p. 954. See, also, § 1045, Comp. St. 1922; § 23-339, R. R. S. 1943.

The Legislature has from time to time entrusted like functions to different governmental subdivisions and agencies and created new governmental subdivisions to exercise these same functions. Flood control and drainage have been entrusted both to counties, §§ 1025, 1026, 1033, Comp. St. 1922; § 23-320.05, R. R. S. 1943; and to drainage districts, Ch. 17, art. IV and V, Comp. St. 1922. Counties may maintain hospitals, § 23-343.08, R. R. S. 1943; and this also may be done by hospital districts, §§ 23-343.21 to 23-343.47, R. R. S. 1943.

The legislative authority to create subdivisions of government to perform special governmental functions to meet the exigencies of changing situations and special needs has been exercised through the years, especially during the last 40, without constitutional restriction. Sanitary districts, Whedon v. Wells, 95 Neb 517, 145 N. W. 1007; rural fire protection districts, Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700; airport authorities, hous-

ing authorities, weed control districts, and later county-wide weed control authorities. Numerous other examples could be cited. The power of the Legislature in this respect has been stated in broad and all-inclusive language in several cases. See, Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; Seward County Rural Fire Protection Dist. v. County of Seward, *supra;* Kaup v. Sweet, 187 Neb. 226, 188 N. W. 2d 891. In Seward County Rural Fire Protection Dist. v. County of Seward, *supra,* this court cited with approval the following language of Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer in-

convenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

The question then becomes precisely this. Does Article VIII, section 5, operate to prevent the Legislature from taking from the counties, or a class thereof, some of their functions and entrusting them to another subdivision of government, giving to that new subdivision of government a power of taxation which may result in the people in the county paying total taxes in excess of the maximum set by Article VIII, section 5. The appellee argues that it does. Her argument and that of the intervener are highlighted in the memorandum opinion of the trial judge where he points out that section 23-120, R. S. Supp., 1971, requires the county to "erect or otherwise provide" courthouse, jail, and other necessary county buildings and therefore to have this function performed by another subdivision of government having taxing authority is simply an evasion of the constitutional limitation of counties to tax.

The briefs of the appellee and intervener and the trial judge's memorandum opinion make special reference to certain provisions of the act, section 23-2611, R. S. Supp., 1971, which provide that the city and county may each "(5) . . . enter into an agreement with the commission" determining "the method or formula for determining the payments to be made by the city to the commission as being applicable to the principal of and interest and premium on the bonds of the commission issued to finance the project. The city shall have the power to levy a tax on all the taxable property in the city, except intangible property, sufficient to make

the payments to the commission applicable to the principal of and interest and premium on the bonds of the commission issued for the project, which tax shall be in addition to all other taxes now or hereafter authorized by statute or charter . . .," but limits the maximum tax to one-half mill. They further point out that no specific mention is made in the act of the county making payments to the commission applicable to the bonds, nor is any added taxing authority given to the county by the act.

It is evident that whatever obligation the county assumes with reference to the commission it must be made within the limits of its existing levy for county purposes, which as already noted is for the fiscal year 1971-72 at the constitutional maximum. The appellee and intervener therefore reason and conclude, as did the trial court, that the one-half mill tax authorized to be made by the commission is to be used to pay what they term "the county's share" of the bonded debt and that the act must contemplate an agreement to this effect. There is in the record, however, no evidence of any agreement between the commission and either the county or the city. The act itself, as we have earlier noted, provides for the payment of the bonds from the funds of the commission.

The appellee's and intervener's position and argument are not implausible and are supported by cases cited by them, but we are not, in the light of the pertinent constitutional provisions, the history which we have recited, and the provisions of the act itself, persuaded that the act is beyond a reasonable doubt unconstitutional on the point in question. State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413; Smith v. Chicago, St. P., M. & O. Ry. Co., 99 Neb. 719, 157 N. W. 622.

The position of the appellee and intervener as noted in the memorandum opinion of the trial court really seems to be that Article VIII, section 5, is not only a limitation on the power of the counties to tax, but also

freezes the power of the Legislature to make changes in county functions. Their argument would in effect imbed part of section 23-120, R. S. Supp., 1971, in the Constitution. We find that in the light of history and the provisions of Article III, section 1, and Article VIII, section 1, we cannot accept this argument. Throughout our history as a state, the Legislature has, as we have already noted, added to and taken away the functions of counties. It has created governmental subdivisions to accomplish special public purposes, which purposes it could have entrusted to existing governmental subdivisions. It has entrusted the same general functions to different subdivisions of government whose territories could overlap or coincide.

Under the facts of this case, the commission does not take over a function exclusively that of the county. It serves the public purpose of providing facilities for two governmental units or more. It relates not just to a courthouse, jail, and governmental offices, but "any building, structure or facility for public purposes" for joint use of the city and county. We point out the act authorizes the leasing of space not needed by the county and city to other agencies of government. Section 23-120, R. S. Supp., 1971, entrusts to the county the duty of furnishing facilities to agencies which do not serve exclusively county functions. That section of the statute reads in part: ". . . and provide suitable rooms and offices for the accommodation of the several courts of record, compensation court or any member thereof, the Commissioner of Labor for the conduct and operation of the state free employment service . . . ." It would be completely unrealistic to say that the Legislature may add county functions but never take them away and entrust them to some other governmental subdivision or even to the state itself.

With specific reference to the question of whether the levy the commission has authorized to make is in reality a county tax, we think the opinion of the court

in Obitz v. Airport Authority of the City of Red Cloud, 181 Neb. 410, 149 N. W. 2d 105, is pertinent. The Airport Authority Act provided that bonds issued by the authority would not (just as in the act we are here considering) constitute a debt of the State of Nebraska or the city in which the authority was established. In the bonds which it proposed to issue the authority covenanted to, so long as the bonds were unpaid, certify annually to the city the maximum tax and to assess charges for airport use. It was argued that the bond covenants violated the statute. In effect the argument was that the tax was a city tax. In the Obitz case Judge Carter, speaking for the court, said: "The amount to be certified to the city to be levied on the tangible property of the city is for the purpose of carrying on the airport facility. It is not levied for the primary purpose of providing for the funding of bonds. The money derived from this tax is a part of the money provided for the construction, operation, and maintenance of the airfort facility. It is a part of the funds of the authority and is not at any time funds of the city although the city performs the ministerial duty of levying, collecting, and paying the tax to the authority. The tax can be levied whether or not the bonds are issued. The tax is in effect that of the authority, a separate entity, a public corporation, and an agency of the city. It is in no sense of the term a city tax, and when the city performs its ministerial functions with reference to its levy, collection, and payment over, the city's responsibility ceases, and no obligation remains. The bonds are general obligations of the authority and not the city. The provision of section 3-509, R. R. S. 1943, that the bonds of the authority shall not be a debt of the city has not been violated for the reason that the city is under no obligation to pay the bonds." The above is applicable here. The one-half mill levy is the levy of the commission and not of the county.

It does appear that counties as subdivisions of

government did and do occupy a unique place in the eyes of the drafters and the people, the ratifiers, of the Constitution. See Article IX. It would appear the Legislature probably cannot substantially destroy the counties by removing all or substantially all of their functions while merely respecting their territorial integrity as required by Article IX. The act does not even remotely approach the point of such substantial destruction, nor do the statutes evidence the slightest tendency on the part of the Legislature to so do. Quite the contrary is evident.

We have already noted the parties each cite several cases supporting their respective contentions. We want to take specific note of some of these. The appellants cite Albuquerque Met. Arroyo Flood Con. A. v. Swinburne, *supra*. In that case the Legislature of New Mexico had created the plaintiff flood control authority which was apparently empowered to deal with flood control in and around the city of Albuquerque. As far as is pertinent to our problem here a two-pronged attack was made on the constitutionality of the act. The constitutional provisions were: "No county, city, town or village shall ever become indebted to an amount . . ., exceeding four per centum on the value of the taxable property within such county, city, town or village . . .," and "The legislature is authorized to provide by law for the organization and operation of drainage districts and systems . . . ." With reference to the first prong, the court said: "It is clear that the indebtedness proposed by the Flood Control Authority is not one contracted by either a county, city, town or village or school district, but is one imposed by a special quasi-municipal corporation under legislative authority. The legislature has plenary legislative authority limited only by the state and federal constitutions. Legislation may be validly enacted if not inhibited by one or the other of these documents." With reference to the second, the court said simply that such provision in

no way restricted the authority of the Legislature to create a flood control authority and that there was no requirement of the constitutional provision mentioned that a flood control authority had to be called a drainage district.

Appellants also cite Walinske v. Detroit-Wayne Joint Bldg. Authority, 325 Mich. 562, 39 N. W. 2d 73. There a majority of the voters of Wayne County had approved an $8,000,000 bond issue, the proceeds of which were to be used to construct a joint city-county building. A companion question authorizing an increase in the mill levy failed to get the required two-thirds voter approval. At the session of the Legislature following the election that body enacted enabling legislation authorizing the City of Detroit and the County of Wayne to incorporate a joint building commission authority. The enabling legislation authorized the authority to issue self-liquidating revenue bonds. The enabling act contained other provisions similar in some respects to L.B. 1003, but did not give the authority power to levy a tax. The enabling act provided that when the bonded debt was paid the facilities were to be turned over to the city and county. The authority had an authorized life span of 50 years. This legislation was challenged in a declaratory judgment and injunction action. The principal contention was that the city and county by entering into a long term lease sufficient to pay bonds of the authority as they became due was a circumvention of the constitutional and statutory provisions requiring a vote of the people to issue bonds. The court dealt with this contention by stating the bonded debt was the debt of the authority and not of the city and county and it was clearly within the authority of the city and county to provide the necessary facilities by lease arrangements with the authority. Other cases supporting appellants' position are Book v. State Office Bldg. Comm., 238 Ind. 120, 149 N. E. 2d 273; City of

Aurora v. Aurora Sanitation Dist., 112 Colo. 406, 149 P. 2d 662.

One of the several cases cited by the appellee is War Memorial Hospital v. Board of County Commissioners, 73 Wyo. 371, 279 P. 2d 472. That case involved a proceeding to determine the validity of taxes levied by a hospital district, a cemetery district, and a fire protection district. All the districts embraced the same territory and included the town of Powell. The constitutional provision in question was: "No incorporated city or town shall levy a tax to exceed eight mills on the dollar in any one year, except for the payment of its public debt and the interest thereon." The court held the provision in question was a restraint upon the authority of the fire protection district to levy a tax on property in the city of Powell, but not a restraint upon the authority of the hospital and cemetery districts. The court rested its decision primarily on the ground that fire protection was a municipal function but the operation of a cemetery and hospital was not, or at least the court had doubts as to these. We do not distinguish the case or others of similar tenor. We reject them for reasons already stated. Other cases of the same general purport are Lowery v. County of Jefferson (Ky. App.), 458 S. W. 2d 168; Bacon v. Kent-Ottawa Metropolitan Water Auth., 354 Mich. 159, 92 N. W. 2d 492; Rappaport v. Department of Public Health, 227 Ind. 508, 87 N. E. 2d 77.

Cross-Appeal

Appellee Dwyer on her cross-appeal raises the issues previously noted.

Article XI, section 5

Appellee contends the act, insofar as it authorizes the City to levy a tax to meet its obligations to the commission, is unconstitutional in that it violates Article XI, section 5, because the act authorized a levy in excess of and in addition to the maximum all-purpose levy provided for in the home rule charter of the city of

Omaha which was adopted under the above constitutional provision. Appellee cites Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 104, 77 N. W. 2d 862: ". . . a provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern, but when the Legislature enacts a law affecting municipal affairs which is of state-wide concern, the state law takes precedence over any municipal action taken under the home rule charter."

The term state-wide as correctly quoted from the above opinion is somewhat misleading when examined in the light of the genesis of the rule and the language of other cases which discuss the issue. These other cases have distinguished "between matters of *strictly* municipal concern and those of state concern." In Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87, the court said: "The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation. . . . It is the well-established law of this state that, in matters of strictly municipal concern, cities which have adopted a 'home rule' charter under article XI of the Constitution are not subject to state legislation. But, in such cities, state legislation is not excluded upon such subjects as pertain to state affairs as distinguished from strictly municipal affairs."

One of the first cases to discuss the issue of when a general law of the state takes precedence over a conflicting city charter provision was Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643. That case pointed to the language of the constitutional provision providing that the charter shall be "consistent with and subject to the Constitution and Laws of this state," and further noted the purpose of the constitutional amendment was to render the charter cities inde-

pendent of state legislation in matters which are strictly of municipal concern. It pointed out the city was independent only in those matters "for its own government" and where powers are entrusted to a city which are not strictly for its own government then general state law takes precedence. In this case it seems clear the act pertains to much more than just the government of the charter city. It encompasses and pertains to county affairs also and to the extent it authorizes the furnishing of facilities for other state and federal agencies it is even broader yet. L.B. 1003 does not violate either Article XI, section 5, or the Omaha charter.

Article III, section 14

Appellee contends the act is unconstitutional because it amends sections 23-119, R. R. S. 1943, and 23-120, R. S. Supp., 1971, without repealing those sections, and therefore it violates Article III, section 14.

Insofar as this contention pertains to section 23-119, R. R. S. 1943, we have decided that point by what has been said on the main appeal. If, as we hold here, the one-half mill levy is not a county levy, then section 23-119, R. R. S. 1943, has not been amended and Article III, section 14, does not apply.

The same may be said of section 23-120, R. S. Supp., 1971, which provides: "The county board shall erect or *otherwise provide* suitable courthouse, . . ." etc. (Emphasis supplied.) Section 23-120, R. S. Supp., 1971, is not amended by L.B. 1003. The provisions of L.B. 1003 are not mandatory. The county may act under section 23-120, R. S. Supp., 1971, or it may "otherwise provide" by availing itself of the provisions of the act which is a complete and independent act in itself. The act does not amend section 23-120, R. S. Supp., 1971. In any event, Article III, section 14, does not apply. See Omaha Parking Authority v. City of Omaha, *supra*.

Article III, section 18

Appellee contends the act violates Article III, section 18, because it is a "local or special" law "granting . . .

special or exclusive privileges" and that a general law "can be made applicable." She asserts the classification limiting the application of the act to cities of the metropolitan class and the counties in which they are located, where the population of the city is more than one-half the population of the county, is arbitrary and relies upon the opinion of this court in City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74. In that case this court held unconstitutional a statute which provided for a mandatory municipal court in cities of the first class having a population in excess of 13,000 and located in counties having a population of 33,000 all as determined by the 1960 census. Only one city of the first class fits this description and because the population figures were tied to the 1960 census no other city could ever enter the class. This court held since the class was closed the limitation was arbitrary and the statute was unconstitutional. In this case the class is an open one so City of Scottsbluff v. Tiemann, *supra,* does not apply on that point.

In City of Scottsbluff v. Tiemann, *supra,* the court went on to say that the classification itself was arbitrary, pointing out that five other cities of the first class exceeded Scottsbluff in population and were not included within the class established by the statute, and further pointed out that tieing the class to county population was arbitrary since the court would serve only the city and the county population had no reasonable relationship. This court could discern, properly so, no reason for such classification. Does the present case come within the ambit of the second point in Tiemann? In Tiemann, this court said: "The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation." Appellee calls our attention to the fact

that in section 1 of the act the Legislature recites that the need for joint facilities exists in cities located in counties where the city constitutes more than half the population of the county, but the act in the enabling portions thereof limits its application to only those cases where the city is of the metropolitan class. There are in fact nine cities and counties within the "class" mentioned in section 1.

Limiting application of the act to cities of the metropolitan class and the county in which located would seem clearly to be a proper classification. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451; Omaha Parking Authority v. City of Omaha, *supra*. Appellee's position seems in effect to be that the recital of need in section 1 is a sort of admission against interest by the Legislature which somehow binds that body and this court to the position that the only reasonable classification is the one referred to in section 1. Appellee cites no pertinent authority. We must view the act on the basis of the class to which it in fact applies. Cities of the metropolitan class are those cities of population of 300,000 or more. The Legislature can certainly take cognizance of the fact that the actual population of the only city presently in the next class is approximately 154,000 and in the next class below that approximately 31,000. The need for joint facilities certainly may vary according to population. We cannot say the classification used by the Legislature here is clearly arbitrary and without any substantial basis founded upon real differences.

Article IX, section 4

Article IX, section 4, provides: "The Legislature shall provide by law for the election of such county and township officers as may be necessary." Appellee asserts the provision of the act providing for appointment of members of the commission violates the above section. The answer is the members of the commission are not county officers. This is implicit in the light of

our holding on the main appeal and we so hold.

Article IX, sections 5 and 2

Article IX, section 5, provides: "The Legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine; and in any county that shall have adopted a township organization the question of continuing the same may be submitted to a vote of the electors of such county at a general election in the manner that shall be provided by law." We cannot see how the act impairs the right of the people of any county to avail themselves of the provisions of Article IX, section 5. The contention is without merit.

Article IX, section 2, contains prohibitions against territorial division of counties without a vote of the electors of each county affected. The act did not violate this section.

Article XIII, section 2

Appellee contends that the act violates Article XIII, section 2, because it authorizes a donation by the city and county to a work of internal improvement. She points to sections 4(6) and (13), and 11(3) of the act and relies upon Lewis v. Board of County Commissioners of Sherman County, 5 F. 269, quoting from this case as follows: "It may be conceded as a general proposition, that a 'courthouse' is a work of internal improvement." She omits, however, the balance of the sentence: "but it may very well be questioned whether our internal-improvement law of the fifteenth of February, 1869, has any application to such a work of internal improvement." In short the court was talking about the definition of the term under a statute enacted by the Legislature. The court then pointed out that other statutes covered the building of courthouses. What we are here concerned with is the meaning of the term under the constitutional provision. The term was defined and the question here involved was pre-

cisely decided in State v. Bone Creek Township, 109 Neb. 202, 190 N. W. 586. There this court said: "In forbidding subdivisions of the state to 'make donations' to any railroad, or other 'works of internal improvement,' without submitting to the electors a proposition to do so, the framers of the Nebraska Constitution of 1875 and the people who adopted it had in mind the evils arising from excessive donations of public funds to enterprises performing public services for private gain. Public buildings used exclusively for governmental purposes, without direct pecuniary profit to any corporation, or individual, are, in the popular sense, internal improvements, but they are obviously not within this constitutional inhibition." Other courts have arrived at similar conclusions. State ex rel. Thomson v. Giessel, 267 Wis. 331, 65 N. W. 2d 529; Rippe v. Becker, 56 Minn. 100, 57 N. W. 2d 331, 22 L. R. A. 857; Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71, 111 N. W. 860.

Article VIII, section 7

Appellee asserts that the act insofar as it authorizes a city to levy a tax violates Article VIII, section 7, which provides in part as follows: "The Legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." Obitz v. Airport Authority of the City of Red Cloud, *supra*, offers a complete answer to this contention. That case says the constitutional provision in question applies only where (1) the levy is for corporate or proprietary purposes, and (2) where it is not levied by local authority. We hold the act pertains to a governmental purpose and the tax is levied by local authority within the meaning of Obitz.

The judgment of the district court that the levy by the commission is in effect a levy for county purposes and enjoining the commission from expending any funds which may be raised by the one-half mill levy is reversed. The judgment that in all other respects the

act is constitutional is affirmed. The judgment is affirmed in part and in part reversed, and the cause is remanded to the district court to enter judgment in conformity with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

The purpose of the act in question is to provide a means whereby buildings, structures, and facilities may be acquired and constructed for joint use by metropolitan cities and the counties in which they are located. § 23-2601, R. S. Supp., 1971. To help finance the plan, the building commission established pursuant to the statute is empowered to levy up to one-half mill upon all the property in the county. § 23-2604, R. S. Supp., 1971.

This tax appears to be the only source of funds provided by the county to defray its share of the expense of the project. In effect, it is a county tax to pay for a county courthouse. The district court correctly held this levy subject to the limitation contained in Article VIII, section 5, of the Constitution of Nebraska.

If the constitutional limitation upon taxes for county purposes has become burdensome and unwise, as suggested recently by the Nebraska Constitutional Revision Commission, the remedy lies in a repeal of the limitation.

NEWTON, J., joins in this dissent.

NEWTON, J., dissenting.

The question at issue is whether sections 23-2601 to 23-2612, R. S. Supp., 1971, comprising L.B. 1003, Eighty-second Session of the Nebraska Legislature, and the construction of a courthouse thereunder, comprise an unconstitutional effort to evade the provisions of Article VIII, section 5, Constitution of Nebraska. That section of the Constitution is as follows: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valua-

tion as determined by the assessment rolls, except for the payment of indebtedness existing at the adoption hereof, unless authorized by a vote of the people of the county."

The legislative bill mentioned will hereinafter be referred to as "the act." Its declared purpose is to provide a means "whereby buildings, structures and facilities can be acquired, constructed, remodeled or renovated and financed for use jointly" by metropolitan cities and the counties in which they are located. It creates a public building commission but provides it can *only be activated by resolution of the county board.* The commission shall be governed by a board of five members, two appointed by the county board, two by the mayor of the city, and the fifth by the other four members. They serve without compensation. The life span of the commission is 20 years or until all liabilities and bonds have been discharged, after which its properties vest in the county and the city. The commission may acquire personal property and also real property, the latter either by gift, purchase, or condemnation. It may also levy a tax not exceeding one-half mill "upon the assessed valuation of all the taxable property *in the county,*" and issue bonds subject to authorization by the city and *the county.* (Emphasis supplied.) The commission books are to be audited by the *county auditor.* The city and county may each *operate and maintain* any project of the commission, *appropriate funds therefor,* convey property to it, *acquire real property for its use,* and contract for the use of commission projects. The city may levy a tax sufficient to make payments accruing on bonds issued: "* * * *Provided*, that if the city shall be subject to a limitation by statute or charter on the amount of taxes which may be imposed by the city for its operating expenses, the maximum which may be levied in excess of such limitation pursuant to the authorization of this subdivision, shall not exceed one half mill on the dollar of assessed valuation of all

taxable property except intangible property; * * *." § 23-2611, R. S. Supp., 1971.

A county is a governmental or political subdivision of the State and has only such powers as are conferred by legislative act. See Lindburg v. Bennett, 117 Neb. 66, 219 N. W. 851. As far back as 1856, when Nebraska was still a territory, counties were authorized and required to provide "courthouses." Laws 1856, p. 71. Counties are still *required* to perform this traditional function. See § 23-120, R. S. Supp., 1971. Notwithstanding the act in question, the construction of courthouses remains a primary county function, just as does the building and maintenance of highways and bridges and the operation and financing of county offices. In fact, without a courthouse, a county could not function at all. If the duty to build a courthouse, jail, etc., primarily county functions to be provided for by a county tax levy, can be abdicated by legislative fiat and financed by some other governmental unit specially created for that purpose, then the same can be done with *all other* county financed activities. The constitutional limitation on levies for county purposes becomes absolutely meaningless as it can be evaded at will. That the act was conceived for purposes of evasion is readily apparent on examination of legislative committee proceedings which reveal the following statements:

"SENATOR SNYDER: (Introducer of the Bill.) * * * The city is not included in this bill. The city says it has the money it needs to build the city-county building. But, the county has had its mill limit, and if it is going to partake in a city-county building, it is going to have to find an additional means of revenue. * * *

"SENATOR CARPENTER: You are tryng to bring out that the county board is going to be the landlord, right?

"MR. CAVANAUGH: No, Sir. They are going to build the building; the commission is going to be the landlord.

"SENATOR CARPENTER: Well, it is about the same

thing. You are going to guarantee it—the county is.
"MR. CAVANAUGH: The county and the city, through our agreements. * * *
"MR. JOHNSON: Senator Carpenter and members of the Committee, I'm Warren Johnson from the Omaha Chamber of Commerce, Staff Manager of the Chamber. The Omaha Chamber has consistently supported the building of a city-county civic center. We feel that LB 1003 provides a means for the county to finance its particular share as you've heard it explained, * * *. * * *
"SENATOR CARPENTER: One other question. On this bill, for example, it says in this language, 'to a project of partly for such purposes and partly for other city or county purposes, by purchase or condemnation in the manner prescribed by law and acquisition.' Are we talking about the acquiring of existing roads, streets, parkways, etc.? Why do you have to have the (inaudible) for a project or partly for such purposes and partly for other city or county purposes?
"MR. HASSETT: (Member of Douglas County Board) The only purpose that is in there is that the bond attorneys have tried to write this so that if it is attacked at court, it would hold up in the Supreme Court. * * * As far as we're concerned, we would be just as happy with that out, because we have just one thing in mind, and that is to build the city-county building in a block immediately west of the courthouse. * * *
"MR. HASSETT: And if we can amend that and take those provisions out, and still have this a constitutional bill, we would support it, because we have no other projects in mind. * * *
"SENATOR GOODRICH: Mr. President, Members of the Body, I'd like to call your attention to the fact that this is a building which will be a joint-use building between the city council and the county commissioners. Consequently the county only has to come up with half of the cost of this building or less. * * *
"SENATOR SNYDER: * * * So it is imperative that

the Legislature pass LB 1003 if the county is going to be able to fulfill its part of the financing."

These quotations have no direct bearing on the issues of constitutionality, but they do indicate the legislative purpose and intention.

The act itself makes it clear that it is a patent attempt to evade the constitutional provision. It will be noted that the commission can only be activated by the county board; commission members are appointed by the city and county officials; it can levy a tax only on the assessed valuation *of the county,* but *the city may and must levy its own tax* for its contribution. The books are audited by the county and both the county and city may transfer real and personal property to the commission without consideration. Both the city and the county may operate and maintain commission projects and appropriate funds therefor. On the demise of the commission, its properties revert to the city and county. It is contemplated that the county may occupy the combination courthouse and city hall free of charge.

It is a well-settled rule that a county can exceed the constitutional limitation on county levies only when authorized by a vote of the people of the county. See Chase County v. Chicago, B. & Q. R.R. Co., 58 Neb. 274, 78 N. W. 502. Also, avoidance of the constitutional limit cannot be accomplished by indirection. Grand Island & W. C. R.R. Co. v. County of Dawes, 62 Neb. 44, 86 N. W. 934. In a similar case, the court commented: "If constitutional and statutory prohibitions could be evaded in this manner, they would in effect be completely nullified and constitute no restraint against the evils they were intended to correct." Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757.

The trial judge aptly and ably analyzed the situation as follows: "In appraising the validity of the Statute before it and the action taken to proceed thereunder, the Court must consider the purpose of the debt limita-

tion section of the Constitution and must look through the form of the Statute to the true inwardness of the situation and to the substance of what it does.

"It seems that the clear purpose of Section 5, Article VIII of the Nebraska Constitution was to prevent the creation of an excessive debt (tax) by a *real* limitation upon the powers of the Legislature and the Counties to authorize (taxation) indebtedness beyond a certain amount unless authorized by a vote of the people.

"If the Constitution may be circumvented by the simple device of creating new and additional political subdivisions in the same territory to perform a function assigned by statute to another political subdivision, each with separate and independent taxing power, for the purpose of evading the Constitutional prohibition, no real limitation upon the Legislature and the Counties to levy taxes is provided and the object of the Constitutional provision is defeated.

"If one unit of government after another may be imposed upon the same territory for substantially the same purpose, or if every purpose may be subdivided and new debt limits created for each subdivision, there will be, in effect, no Constitutional debt (tax) limitation at all."

In a similar situation, the court in Lowery v. County of Jefferson (Ky. App.), 458 S. W. 2d 168, stated: "The purpose of creating any kind of separate taxing district would seem to be to provide financing for the accomplishment of a public purpose which for some reason or another cannot effectively be accomplished through the facilities and resources of a traditional municipality such as a county or city. Examples are fire protection districts, drainage districts, library districts, health districts, road districts, flood-control districts, hospital districts, etc. But if such a district is to have the power to impose taxes separate and apart from county or city taxes, and not chargeable to the rate limit of any county or city, it is plain that the ultimate power to decide whether the tax shall be levied cannot be vested in

the governing body of a county or city, for then the purported district is in reality nothing but a subterfuge to evade limits on tax rates. For illustration, if the fiscal court of a county has sole voice as to whether or not a particular tax shall be levied upon the taxpayers of the county, it would be pure sophistry to say that the tax is not a *county* tax."

In the case before us, the county alone can activate the commission which is tantamount to invoking the tax levy provided for in the act.

In War Memorial Hospital v. Board of County Commissioners, 73 Wyo. 371, 279 P. 2d 472, it was held: "The establishment of public cemetery and public hospital not being a distinctive governmental function of city, and not having been made essential governmental function pursuant to distinct statute, taxing powers of hospital district and cemetery district were not affected by constitutional prohibition against any incorporated town or city levying tax in excess of eight mills on dollar, and tax authorized by statute for upkeep of such districts could be levied by county board notwithstanding that total levy already requested by municipality affected might be eight mills. * * *

"Under provision of constitution prohibiting any incorporated town or city from levying tax in excess of eight mills on a dollar, imposition of additional three mill tax levied by fire protection district to which municipal corporation belonged was forbidden in view of fact that fire protection was a necessary municipal and governmental function which municipality was required to perform."

The providing of a courthouse is certainly a governmental function specifically required of a county by statute.

In Bacon v. Kent-Ottawa Metropolitan Water Auth.. 354 Mich. 159, 92 N. W. 2d 492, the court dealt with a similar constitutional tax limitation and in denying the taxing power of the authority reasoned as follows:

" 'Careful study of the amendment leads to these conclusions: Clearly the intent was to provide by the fundamental law of the State, which had not theretofore contained such provision, a general limitation upon the exercise of the taxing power of the State. The evil or abuse sought to be remedied was excessive taxation imposed by governmental agencies without the consent of those upon whom the burden was placed.'

"Of such economic conditions the 15-mill amendment of 1932 was conceived, initiated, supported and adopted. But what about the *existing law* defining 'a municipal corporation,' with respect to which the people presumptively determined to apply such final exception? Was it intended to include an 'authority' which—a quarter century later—has been authorized or created by legislative act and dubbed, by legislative fiat, 'a municipal corporation'? To speak plainly, an affirmative answer to this last question—if given—will automatically grant to the legislature the power of outright repeal of a duly-voted constitutional provision.

"* * * Did the people will that the expression 'a municipal corporation' should be construed as meaning or referring to some entity or agency other than those already commonly known or recognized by 'existing laws' as municipal corporations? Did they bother to resolve a statewide constitutional limitation upon the power of property taxation and, by the same instrument of resolution, mean to provide the legislature with power to nullify the limitation as applied to legislatively manufactured new types of 'municipal corporations'? Are we to say that the electors of 1932 planned to hand the existing or any future legislature the power and authority to undo, at will, that which became the essence of their resoundingly successful initiatory effort?"

The cited cases make it clear that the majority opinion, by judicial and legislative fiat, has nullified the constitutional limitation on levies for county purposes. It deprives the electorate of that portion of their right of

suffrage guaranteed by the Constitution as it relates to excess county levies. In the creation of new governmental subdivisions empowered to levy taxes, a line can logically and should be drawn between essentially state, county, or municipal governmental powers and others.

ARTHUR J. ABBOTT, APPELLEE AND CROSS-APPELLANT, V. ETHEL S. ABBOTT, APPELLANT AND CROSS-APPELLEE.
195 N. W. 2d 204

Filed March 3, 1972. No. 38010.

1. **Trial: Evidence: Fraud.** The parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud.
2. **Contracts: Fraud.** A disclaimer clause in a bargain is relevant to the issue whether the claimant in fact relied on the false representation disclaimed in the clause.
3. **Interest: Judgments.** Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right.
4. **Interest: Evidence.** A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion.

Appeal from the district court for Grant County: ROBERT R. MORAN, Judge. Affirmed.

Finlayson, McKie & Fisk and Lester A. Danielson, for appellant.

Wright & Simmons, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Damages for promissory fraud in settlement of objections to probate of a will were sought by Arthur J. Abbott from Ethel Abbott, his stepmother. On remand after Abbott v. Abbott, 185 Neb. 177, 174 N. W. 2d 335 (1970), a jury found for Arthur. The district court

awarded him prejudgment interest on the amount of the verdict from February 9, 1960, the date of final distribution of the assets of the estate.

Ethel appeals. She assigns for error (1) the denial of her motion for judgment notwithstanding the verdict and (2) the award of interest. Arthur cross-appeals. He asserts error in the court's denying him prejudgment interest compounded annually.

SUMMARY OF EVIDENCE

Christopher J. Abbott at the time of his marriage to Ethel in 1933 was the father of Arthur, age 18, Glaideth, and Phyllis. On January 10, 1954, Christopher died leaving a form of will. It gave one-half the estate to Ethel and out of the other half, specific legacies to Christopher's brother, LeRoy Abbott, Arthur, and Glaideth. It provided for distribution of the remainder to Arthur and his sisters in equal shares. The subscribing witnesses were LeRoy, Ethel, Arthur, and Miles Lee, a lawyer and nonbeneficiary.

Arthur and his sisters, accepting an invitation that excluded any counsel for them, attended a meeting of named beneficiaries. Other beneficiaries were present with counsel. In the confusion and with pressure on them the sisters departed to seek legal advice. They subsequently threatened to contest probate of the will. One objection was defective attestation argued as follows: In event of a will contest Ethel, a subscribing witness, would be compelled to testify. Upon doing so, regardless of the outcome of the contest, she would receive only one-fourth, her intestate share, instead of one-half. The difference between the one-fourth and the one-half was $1,250,000. In the absence of a contest the will would be admissible without her testimony, and she would receive a one-half share. Everyone conceded that the objection was sound.

On March 29, 1954, at a meeting in Omaha of all beneficiaries, except the sisters, Arthur alone was not represented by counsel. There he suddenly offered to give

up enough property to equalize the childrens' shares. Equalization was acceptable to the sisters provided Ethel made up the difference. During the meeting but only in the presence of Arthur and Lee, the promise in suit was given orally by Ethel. She would pay Arthur the difference in value between the property covered in the will provisions for him and the property distributed to him from the estate. The difference would be payable upon final distribution of the assets of the estate. Ethel subsequently repeated the promise, attaching conditions that Arthur would assist in winning his sisters and in gaining admission of the will to probate. Arthur performed.

Counsel, negotiating terms of a settlement, prepared several drafts without consulting Arthur, who had not engaged counsel. The final draft was to be approved in writing by counsel for each party. Upon advice then given by Ethel, Arthur engaged Lee to represent him and the estate. Lee subsequently advised Arthur that the offer of settlement which did not express Ethel's prior oral promise was grossly unfair and unacceptable. Arthur agreed, but he subsequently informed Lee that he intended to sign anyway, and he requested Lee's written approval. Lee approved the settlement but only after Arthur signed a letter setting out Lee's actual advice and in effect exonerating Lee from malpractice.

The settlement was signed on May 10, 1954, the day the will was admitted to probate. It generally saved a one-half share for Ethel. Arthur received $303,412.25 less than he would have received under the will without the settlement. The provision for him under the will was less than was the provision for him under the statutes of descent and distribution. Arthur testified to reliance on the oral promises of Ethel.

Prior to June 1, 1954, Lee was discharged as attorney for Arthur and the estate. From that time to April 1962 Arthur acted without the advice of counsel.

A meeting was held in Lincoln on July 10, 1959, relat-

ing to final distribution of estate property. There Arthur twice was queried whether any promise other than an unrelated one given at the funeral, had been made to him by Ethel. According to his testimony, Arthur knew that he must take a stand then or never, but he thought Ethel's oral promises were not enforceable. The room was quiet for several minutes. Arthur hung his head. Then, according to two lawyers, and Arthur himself, he twice answered, "There were no promises." According to Glaideth and Phyllis, Arthur in a low voice quietly added, "at least not in writing."

Christopher orally had promised Arthur some cattle that were undelivered at his death. At the funeral and prior to any inkling of probate objections Ethel promised Arthur that she would deliver the cattle. That promise was the one mentioned at the meeting in Lincoln. It had not been covered in the family settlement agreement or in plans for final distribution of estate property. On December 29, 1959, Arthur signed an instrument acknowledging receipt of the cattle. His signature was witnessed by LeRoy and James C. Quigley, a lawyer, who had represented LeRoy in the family settlement. The instrument, typewritten, was headed "RECEIPT." It began: "RECEIVED of Ethel S. Abbott . . . 250 . . . head of cattle . . . classified as follows . . .." After listing 11 classes, the value of each, and the total, $37,420, it continued: "in full and complete payment and satisfaction of the only verbal promise made by . . . Ethel . . . to the undersigned, in the deduction of said cattle from her distributive share of the cattle belonging to the estate of Christopher J. Abbott, deceased, the same to be a part of my inheritable share of cattle belonging to said estate."

At the time Arthur signed the "receipt," according to him, he was under pressure to locate ranch land for his cattle. The lease and the receipt formed a single transaction. He read the receipt hurriedly, and he did not notice the disclaimer clause. Had he noticed it, ac-

cording to his testimony, he would not have signed the receipt.

Arthur, a college graduate with a degree in business administration, had been managing ranches of Christopher. He also was a director of several banks. A jury, however, might reasonably find the relationship between Arthur and Ethel to have been the one summarized by Lee: "Well, it seemed obvious, of course, that Arthur . . . was greatly dependent upon someone after his father's death. Ethel . . . took the role of mother as much as a stepmother could. And of course I would say very largely dominated all business matters that affected Arthur and affected the estate. Q. In your observation did Ethel . . . have control over Arthur? A. In my opinion she very largely did, she very largely did."

Pleadings and pretrial stipulations established the following facts: Entry of final decree in the estate and final distribution of the assets had occurred February 9, 1960. Arthur received assets with a value of $303,415.25 less than the value of the assets he would have received under the will. Arthur's petition prayed for recovery of $303,415.25, with interest at 6 percent a year from February 9, 1960. The district court found the claim to be liquidated. It allowed Arthur interest in accordance with the prayer, the $303,415.25 set out in the jury verdict being fixed as a matter of law.

MOTION BY ETHEL FOR JUDGMENT

Ethel contends that the clause in the "receipt" contractually disclaimed promissory fraud on her part, and that it was a release. Several general rules relating to fraud in contract, tort, or both arguably support her contention. A person who offers no explanation to avoid a receipt in which he acknowledged full payment of the amount due under a written agreement not to contest a will in consideration for such payment may not recover. See Knoll v. Knoll, 173 Neb. 602, 114 N. W. 2d 40 (1962). Generally in the absence of fraud, one who does not choose to read a contract before signing it can-

not later relieve himself of its burdens. General Motors Acceptance Corp. v. Blanco, 181 Neb. 562, 149 N. W. 2d 516 (1967). Where ordinary prudence would have prevented the deception, an action for fraud perpetrated by such deception will not lie. Swanson Petroleum Corp. v. Cumberland, 184 Neb. 323, 167 N. W. 2d 391 (1969). Generally a mistake of law is one upon which a party cannot rely, as all parties are bound to know the law. Beltner v. Carlson, 153 Neb. 797, 46 N. W. 2d 153 (1951).

Other rules lend support to the submission of promissory fraud issues to the jury in this case. The parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott, 185 Neb. 177, 174 N. W. 2d 335 (1970); cf. Central Constr. Co. v. Osbahr, 186 Neb. 1, 180 N. W. 2d 139 (1970). A disclaimer clause of a bargain is relevant to the issue whether the claimant in fact relied on the false representation disclaimed in the clause. Without more the clause is ineffective to preclude a trier of fact from considering whether fraud induced formation of the bargain. Camfield v. Olsen, 183 Neb. 739, 164 N. W. 2d 431 (1969). The rules in general attempt to strike a balance among competing policies. Objectivity and certainty in the law of contracts are desirable, but at times they are too weak to protect legitimate expectations of fair dealing.

The emphasis upon fair dealing is nowhere more apparent today than it is in the article of the Uniform Commercial Code relating to sales. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." § 2-302(1), U.C.C.

Apart from statute, the need for security of transactions in the traditional sense has yielded somewhat to

the need for flexibility. See, Keeton, "Fraud-Statements of Intention," 15 Tex. L. Rev. 185 (1937); Kessler and Fine, "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study," 77 Harv. L. Rev. 401 at 448, 449 (1964); Seavey, "Caveat Emptor as of 1960," 38 Tex. L. Rev. 439 (1960). A disclaimer clause in a family settlement agreement will not necessarily bar recovery for fraud. A subsequent agreement for a valuable consideration is sometimes strong evidence against the claimant. It may be strong enough to bar recovery as a matter of law. Among the elements for consideration of its effect are the presence or absence of specific assent to the disclaimer, the extent of any inequality of bargaining power, the adequacy of the consideration, and the nature of the relationship between the parties. Cf. Note, 47 Cornell L.Q. 655 (1962). In this case the evidence, including the disclaimer clause of December 29, 1959, was sufficient to support a verdict for Arthur on the issue of promissory fraud.

PREJUDGMENT SIMPLE INTEREST

Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Examples are claims upon promises to pay a fixed sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate." McCormick, Damages, c. 7, § 54, p. 213 (1935). See, also, § 45-104, R. R. S. 1943; Mid States Engineering v. Rhode, 182 Neb. 590, 156 N. W. 2d 149 (1968).

In the present case the value of all property in the estate for inheritance and estate taxation was determined prior to final distribution. Arthur and Ethel were legal representatives of the estate. Those data were sufficient for the court properly to conclude that the claim of Arthur was liquidated. The allowance of pre-

judgment interest was correct. See generally Oleck, Damages to Persons and Property, §§ 300 and 301, pp. 641 to 651 (1961).

COMPOUND INTEREST

Arthur and Ethel were fiduciaries, and Arthur argues an analogy of trust law. Most jurisdictions allow a beneficiary under certain circumstances to recover compensation in the form of prejudgment compound interest from the trustee. See, Restatement, Trusts 2d, § 207(2) (1959); 1 Sedgwick on Damages, § 344, p. 680 (9th Ed., 1912).

The general rule is that in the absence of contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt. See, Cherokee Nation v. United States, 270 U. S. 476, 46 S. Ct. 428, 70 L. Ed. 694 (1926); United States v. Marina Realty Co., 82 F. Supp. 640 (D. C. Puerto Rico, 1949); Blanchard v. Dominion Nat. Bank, 130 Va. 633, 108 S. E. 649, 27 A. L. R. 78 (1921).

We need not decide whether compensation in the form of compound interest on a claim of fraud is ever recoverable. The evidence in this case compelled no such allowance.

The judgment is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the result and in the opinion of the court, but I would deal with the issues raised by the "receipt" as follows. The recital in the "receipt" re "the only oral promise" was at most merely an admission against interest. In any event it is ambiguous on its face as to whether it pertains to the transaction which is the basis of the suit. Dunn v. Alexander, 104 Neb. 628, 178 N. W. 215, governs. The receipt raised only a jury question and the jury found for Arthur.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion of the court that allows the plaintiff prejudgment interest. In a case as

doubtful as this, the defendant should be allowed to litigate her rights without the risk of a judgment that will include more than $200,000 in interest.

WHITE, C. J., concurs in this dissent.

LEONARD R. BOYD, DOING BUSINESS AS SOUTHWEST PLUMBING AND HEATING COMPANY, APPELLANT, V. BENKELMAN PUBLIC HOUSING AUTHORITY ET AL., APPELLEES.

195 N. W. 2d 230

Filed March 3, 1972. No. 38029.

1. **Contracts.** In the absence of an otherwise binding agreement, express or implied, there is no privity of contract between a subcontractor and the owner.
2. ———. Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof.
3. **Contracts: Payment: Words and Phrases.** Final settlement is not synonymous with final payment. It precedes payment and denotes the proper administrative determination with respect to the amount due.
4. **Contracts.** Final settlement occurred when an administrative determination was made with respect to the amount due, following completion of the project, which was accepted by the owner.

Appeal from the district court for Dundy County: NORRIS CHADDERDON, Judge. Affirmed.

Sarah Jane Cunningham, for appellant.

Leon Hines, Herbert E. Story, and Thomas F. Colfer, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action brought by a subcontractor to recover, for work and materials furnished on a construction proj-

ect, from the surety on the performance bond of the defaulting principal contractor and from the owner of the project. The district court found for the defendants and we affirm the judgment so entered.

The Benkelman Public Housing Authority entered into a contract with the Joe Dougherty Construction Company for the construction of a housing project. United Bonding Insurance Company became surety on Dougherty's bond as required by section 52-118, R. R. S. 1943. Plaintiff subcontracted the plumbing, heating, air conditioning, and outside utilities portion of the project from Dougherty. On default by Dougherty, United, as surety, undertook to complete the project. It was completed and accepted by the Housing Authority on July 26, 1966. There appears to have been some dispute between United and the Housing Authority as to the sums remaining due from the Housing Authority. A meeting was held between them on September 22, 1966, at which time United offered a compromise settlement calling for a further payment of $4,000 by the Housing Authority in final settlement of all its obligations. On October 4, 1966, the board of commissioners of the Housing Authority approved the settlement in the following language: "* * * BE IT RESOLVED * * * that the compromise settlement presented to this meeting between this Housing Authority and the United Bonding Insurance Company be, and the same hereby is, accepted, and the Executive Director, * * * is herewith authorized and directed to execute the compromise settlement and return it with the payment of the amount set forth therein to the offeror." The settlement agreement was reduced to writing and executed on November 4, 1966, and the $4,000 payment made on November 9, 1966. The settlement agreement provides that it shall not be construed as releasing "United from its obligation to secure payment to persons furnishing material or labor on said project in accordance with the terms of the performance and payment bond executed by United with reference

thereto." Plaintiff seeks to recover for work and materials furnished.

Two questions are presented. First, does plaintiff have a cause of action against the Housing Authority? Second, is the statute of limitation, section 52-118.02, R. R. S. 1943, a bar to plaintiff's action against United?

It seems clear that plaintiff has no right of recovery from the Housing Authority. His contract was with the principal contractor, Dougherty, and not with the Housing Authority. "In the absence of an otherwise binding agreement, express or implied, there is no privity of contract between a subcontractor and the owner." Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227. See, also, Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313.

At the September 22, 1966, meeting, United offered to the Housing Authority certain terms for a final settlement of their respective liabilities under the housing project contract. This offer, as embodied in exhibit 24, was accepted by the Housing Authority on October 4, 1966, and the action recorded in the minutes of the meeting of the officers of the Housing Authority. There was at this time a final settlement entered into notwithstanding the agreement was later reduced to writing. "Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; * * *." Restatement, Contracts, § 26, p. 33. See, also, Annotation, 122 A. L. R. 1217; Reynolds & Maginn v. Omaha General Iron Works, 105 Neb. 361, 180 N. W. 584.

In Westinghouse Electric Supply Co. v. Brookley, 176 Neb. 807, 127 N. W. 2d 465, this court held: " 'Final settlement is not synonymous with final payment. It precedes payment and denotes the proper administrative determination with respect to the amount due.' " The record in the present case does not reflect that "a proper

administrative determination" was made by Dougherty or United which was later accepted by the Housing Authority. Rather, it indicates that a difference of opinion existed which was compromised by means of the settlement agreement. Of necessity, the "final settlement" must be considered to have occurred either on September 22, 1966, or as of the date the settlement agreement was entered into. Plaintiff not having instituted suit until October 27, 1967, more than 1 year after October 4, 1966, it would appear that the action is barred by the limitation set up in section 52-118.02, R. R. S. 1943.

It is true that the record reflects the following facts. Under the settlement agreement United was required to set up a trust fund for the payment of subcontractors and creditors of Dougherty. It is stipulated that plaintiff was such a subcontractor and that there is due him the sum of $5,682.76. United paid to Herbert E. Story, as trustee, the sum of $10,000 for this purpose. Story was, at all times material to this action, acting as attorney for United. On May 18, 1966, he had written to plaintiff assuring him that United was responsible for the payment of all labor and material bills and that funds were to be deposited in trust to pay the claims. Story was aware of plaintiff's claim. The unexpended trust funds inured to the benefit of United which authorized Story to apply the funds on attorney's fees due Story from United. The settlement agreement clearly contemplated payment by United of the outstanding claims against Dougherty. Failure to pay the sum concededly due plaintiff may be a breach of the settlement agreement in regard to which plaintiff was a third party beneficiary. This cannot alter the situation. The pleadings are limited exclusively to the question of liability on the original bond and that liability has been barred by the 1-year statute of limitation. No facts tolling the operation of the statute have been alleged.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH and SPENCER, JJ., dissenting.

Under the facts in this case it is doubtful whether the informal understanding reached at the meeting of the representatives of the parties in Omaha on September 22, 1966, should be considered to be a "final settlement of the principal contract" within the meaning of section 52-118.02, R. R. S. 1943. However, it is unnecessary to decide that question because of the relationship between the plaintiff and United Bonding Insurance Company after the default of Dougherty.

The bonding company concedes that it completed the project under an assignment of the contract from Dougherty. Since it assumed the role of the principal contractor, its liability was not limited to the bond under the facts in this case.

In Southern Surety Co. v. Weaver Bros. (Tex. Civ. App., 1931), 35 S. W. 2d 255, affirmed 56 S. W. 2d 634 (1933), a surety under the terms of its performance bond took over and completed a contract for the construction of a church when the contractor defaulted. The bond provided, in language similar to the case at bar, that the completing surety had an assignment to the rights of the contractor. The Texas court held that when the surety company took over the contract under the assignment, it assumed all of the responsibilities of the contract and was liable to a materialman for material provided to the contractor before default even though the materialman did not file a mechanic's lien within the statutory time.

McCOWN, J., joins in this dissent.

WILLIAM E. NICHOL, DOING BUSINESS AS SCOTTSBLUFF CREDIT BUREAU, APPELLEE, V. MARY CLEMA, APPELLANT.
195 N. W. 2d 233

Filed March 3, 1972. No. 38034.

1. **Husband and Wife: Statutes: Words and Phrases.** The term family as used in section 42-201, R. R. S. 1943, includes a husband who is residing in the same household with the other members.
2. **Husband and Wife: Statutes: Support of Persons.** Medical services furnished a husband individually are necessaries within the meaning of section 42-201, R. R. S. 1943, for which a wife may be liable.
3. ———: ———: ———. Each case of what are necessaries and who is included within the term family as provided in section 42-201, R. R. S. 1943, must be determined on its own facts.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Marvin L. Holscher, for appellant.

George A. Sommer, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from a judgment of the district court for Scotts Bluff County which held under the provisions of section 42-201, R. R. S. 1943, the property of Mary Clema was liable for medical services furnished to her husband, Joseph Clema, at his request. Execution on a judgment against Joseph Clema had been returned unsatisfied. The plaintiff then brought this action under the above statute. Section 42-201, R. R. S. 1943, insofar as it is pertinent, provides as follows: ". . . Provided, all property of a married woman, except ninety per cent of her wages, not exempt by statute from sale on execution or attachment, regardless of when or how said property has been or may hereafter be acquired, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after

execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same."

Mary contends Joseph is not included in the term family as that term is used in the statute and the judgment against him was not for necessaries furnished the family. These contentions are founded upon the highly unusual set of circumstances under which the Clemas live. There is no dispute in the facts. The case was tried upon a stipulation.

The stipulated facts show the Clema marriage has been the subject of constant litigation between the parties. Mary made an unsuccessful attempt to divorce her husband in 1949. In 1951 Joseph filed a suit claiming an interest in certain real estate belonging to Mary. In that action the court held the land in question was the separate property of Mary but Joseph had the right to occupy the dwelling house as a home. Joseph filed suit against Mary in 1960 seeking an order of the court directing her to support him. This case is still pending and no order has been entered. It is stipulated that because of the 1951 decree Mary allows Joseph to live in the house, however, each party maintains his own bedroom and lives separate from the other in every respect. Each furnishes his own support, prepares his own meals, does his own laundry, and, except for occupying the same premises, are as strangers. Mary, however, pays the utilities bills, taxes, and upkeep on the home. Joseph has been totally incapacitated for at least 10 years and has not contributed anything to the support of Mary since 1948 except a $10 payment on a gas bill many years prior to this litigation. Mary filed an action for divorce against Joseph on December 1, 1969, and this action is still pending. Medical services rendered Joseph were furnished from 1965 to 1967 prior to that divorce action.

Both parties cite and rely upon separate portions of the

opinions in Leake v. Lucas, 65 Neb. 359, 91 N. W. 374, 62 L. R. A. 190, adhered to on rehearing 65 Neb. 365, 93 N. W. 1019. In that case this court said: "We do not intend to establish a rule of law by which we shall be conclusively bound in such cases hereafter, for every decision upon this question must necessarily be largely governed by the facts existing in the particular case in which it is rendered. . . . We ought to give the statute a reasonable construction, and we therefore hold, under the facts in this particular case, that when the husband is actually a part of the family, living with it as such, and is for some reason temporarily incapacitated by illness, his maintenance and support, including medical attendance, comes fairly within the rule of the statute which makes the wife liable as his surety therefor. . . . There can be no doubt that the word 'family' includes the husband, and that 'necessaries' furnished him for his individual use, are furnished the family within the meaning of the statute."

Mary of course stresses the portions of the opinion in Leake v. Lucas, *supra,* referring to each case being decided on its own facts, statements in the opinion with reference to temporary incapacity, and the recital that the services furnished enabled the husband to return to health and again support his family. She argues that under the facts here there is no "family" within the meaning of the statute and, apparently by implication at least, the services furnished were not in any event necessaries of the family because Joseph contributed nothing to the wife's support and the medical services were not of any benefit to the family for Joseph could not be restored to health.

This is a case which is not easy of decision, but the following factors persuade us the judgment of the trial court should be affirmed. Joseph and Mary, despite their strained relationship, are in fact husband and wife. Mary has been unsuccessful in her efforts to obtain a divorce. They live in the same house and, to the casual

observer at least, appear to be a family. There was no divorce action pending between them at the time the services were furnished although, as we have noted, it is stipulated that Joseph lives in the home only because of the decree of the court. This decree would appear to be based upon a finding that he has a right to do so because it is the family homestead. Mary appears to have acquiesced in this finding as she has not appealed from that decree. Also, Leake v. Lucas, *supra,* clearly holds that medical services furnished a husband are family necessaries within the provisions of section 42-201, R. R. S. 1943, and we do not understand that our court in that case founded its decision upon the effectiveness of the medical services in restoring the husband to health and earning capacity. Further, practically all the cases which have considered the matter hold medical service furnished the husband individually are a family necessary under statutes comparable to section 42-201, R. R. S. 1943. Under some circumstances even though the husband and wife are not living under the same roof they may still constitute a family. A case worthy of note is In re Guardianship of DeNisson, 197 Wash. 265, 84 P. 2d 1024, where the estate of the wife, who was confined in an asylum, was held liable for the support of an aged and indigent husband.

We reiterate the statement in Leake v. Lucas, *supra:* "We do not intend to establish a rule of law by which we shall be conclusively bound in such cases hereafter, for every decision upon this question must necessarily be largely governed by the facts existing in the particular case in which it is rendered."

In his brief plaintiff asks for an attorney's fee in this court under the provisions of section 25-1801, R. S. Supp., 1969. The existence of conditions precedent for such an allowance are neither pled nor proved. See Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924. No fee can be allowed.

AFFIRMED.

H. W. PATTERSON, APPELLANT, V. CARL W. RENSTROM ET AL., APPELLEES.
195 N. W. 2d 193

Filed March 3, 1972. No. 38040.

Limitations of Actions: Libel and Slander: Time. The statute of limitations in a libel action commences to run upon publication of the defamatory matter which forms the basis of the action.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Walsh, Walentine, Wolfe, Miles & Katskee, for appellant.

Edward G. Garvey, James R. McGreevy, and Cline, Williams, Wright, Johnson & Oldfather, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

The plaintiff, H. W. Patterson, brought this action against the defendants, Carl W. Renstrom and Tip-Top Products, a corporation, for damages from certain allegedly slanderous, libelous, and defamatory letters published and mailed in November 1960. The defendants demurred on grounds that the claim was barred by the statute of limitations. The demurrers were sustained and the plaintiff has appealed.

Plaintiff operates a business under the name of The Ti-Not Company which sells a women's rubber hair fastener. The defendant, Carl W. Renstrom, is the president of the defendant Tip-Top Products, a corporation. That company operates out of Omaha, Nebraska, and manufactures and sells various hair accessory products.

In October 1960, the plaintiff wrote to some of his customers that the defendant, Tip-Top Products, was misrepresenting the patent status of a competing Tip-Top product. In November 1960, Tip-Top Products, in a letter to its customers, written by defendant Renstrom, responded by agreeing to hold the customers harmless

on all claims pertaining to the questioned patent. In some letters, Tip-Top also enclosed a Dun and Bradstreet report on plaintiff Patterson and his business and referred to plaintiff's "considerable irresponsibility."

In October 1970, in the course of a patent suit, the plaintiff discovered that such letters had been written by the defendant, Tip-Top, in 1960. This action was filed on November 6, 1970, in the district court for Douglas County.

The sole issue argued in the district court involved the applicable statute of limitations and when it began to run. It is the plaintiff's contention that the statute of limitations in an action for libel or defamation should not begin to run until the fact of the libel or defamation is discovered. He relies on judicial interpretations of limitation statutes applicable to professional malpractice and fraud cases.

Section 25-208, R. R. S. 1943, provides in part: "The following actions can only be brought within the periods herein stated: Within one year, an action for libel, slander, assault and battery, false imprisonment, malicious prosecution, or an action upon a statute for a penalty or forfeiture, * * *."

In this state, the statute of limitations in a libel action commences to run upon publication of the defamatory matter which forms the basis of the action. See, Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559; Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686.

Even if it be assumed that a 4-year statute of limitations was involved or that the principles involved are akin to those of malpractice or fraud, it does not help the plaintiff. In such cases we have consistently held that "discovery" means discovery of the facts constituting the basis of the cause of action, or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. See Jameson v. Graham, 159 Neb. 202, 66 N. W. 2d 417.

Here there is no allegation of fraud or fraudulent concealment. By analogy the statute of limitations under section 4 of the Clayton Act involves related issues. Under that statute mere ignorance of the facts constituting a cause of action, in the absence of the defendant's fraud, and mere ignorance of the evidence which would be probative of the plaintiff's claim, will not suffice to postpone the operation of the statute of limitations. See 4 Callmann, Unfair Competition Trademarks and Monopolies (3d Ed.), § 87.5(b), p. 164. It is quite apparent that if there had been any special damage, required to be alleged and proved in a case such as this, the existence of such damage would undoubtedly have been sufficient to put the plaintiff on inquiry as to the source long before even a 4-year statute of limitations might have expired.

The action of the district court in sustaining the demurrers of both defendants was entirely correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., not participating.

SALLY JO SCHNEIDER, APPELLEE, V. HAROLD DUANE SCHNEIDER, APPELLANT.

195 N. W. 2d 227

Filed March 3, 1972. No. 38053.

1. **Divorce: Parent and Child.** In a proceeding for modification of an order for child support a post-decree birth is a change of circumstances, although the decree provided for support of the unborn child.
2. **———: ———.** A father is primarily liable for support of his minor children, his liability being independent of the assets of the mother.
3. **Divorce: Parent and Child: Appeal and Error.** The order of the trial court in a child support proceeding will not be overturned unless there is found an abuse of discretion.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

George A. Sommer, for appellant.

Wright & Simmons and John F. Wright, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The district court increased the allowance payable by Harold Duane Schneider to Sally Jo Schneider for child support to $200 a month. Harold appeals.

On May 6, 1970, Sally and Harold stipulated that he would pay her $150 a month for child support. The payment was to be for the support of Kari and an unborn child. The following day the court incorporated the stipulation into a decree that awarded Sally an absolute divorce.

On September 8, 1970, Sally gave birth to a child, Karmen. On October 26 she petitioned for an increase to $250 a month for child support. At the trial in January 1971 she testified as follows. At the time of the stipulation she had not anticipated certain circumstances. They were living expenses and the length of her unemployment because of the pregnancy. In addition she desired to send Kari, age 3½, to preschool at a cost of $5 a day.

Sally at the time of trial was employed at a monthly salary of $320 gross, $260 net. Harold was a manager of Universal C.I.T. at a gross monthly income of $745 which he had been receiving for some time. A Christmas bonus in 1970 amounted to $260. His net monthly income was $575 which resulted partly from his claim of one exemption for withholding of income taxes. He intended to claim two more exemptions for the children in 1971. He owned an automobile which he needed in his employment. Among his other assets were a trailer, a color television set, and a stereophonic sound console. The trailer was heavily encumbered.

If the circumstances of the parties shall change or it shall be to the best interests of the children, the court may alter the decree respecting care and maintenance of the children. § 42-312, R. R. S. 1943. A post-decree birth is a change of circumstances, although the decree provided for support of the child.

A father is primarily liable for support of his minor children, his liability being independent of the assets of the mother. The order of the trial court in a child support proceeding will not be overturned unless there is found an abuse of discretion. Benton v. Benton, 187 Neb. 205, 188 N. W. 2d 685 (1971).

The district court in this proceeding committed no abuse of discretion. The order is affirmed. Sally requests an allowance for services of her counsel in this court. The request is denied.

AFFIRMED.

NEWTON, J., dissenting.

I disagree with the majority opinion. Decree of divorce was entered herein on May 7, 1970, following a hearing at which both parties were represented by able counsel. A stipulation had been entered into regarding disposition of the property of the parties, custody of a minor daughter, and one unborn child, child support for the children including the one not born, and medical expenses. On October 26, 1970, plaintiff filed her petition for an increase in child support payments previously fixed at $150 per month by stipulation incorporated in the decree. The court decreed an increase to $200 per month.

At the time of the divorce, plaintiff was earning $260 per month, her apartment rent, with utilities included, was $135 per month, defendant's salary was $745 per month and remains unchanged. Plaintiff moved to Sidney, Nebraska, and is presently employed at a salary of $320 per month. She has purchased a house carrying monthly payments of $80 and has utilities expense of $35 per month. She had an automobile before the divorce

and there has been no change in transportation expense except that she has purchased a new car and is making payments of $50 per month. She states her baby-sitting expense has increased by about $45 per month and wishes to send the 3½-year-old daughter to preschool at a cost of $100 per month. Her house expense is now $20 per month less than the rent she formerly paid and with each payment she increases her equity in the house. She now enjoys a salary increase of $60 per month. These factors nearly offset the increase in car payments and baby-sitter's fees. The only new element of consequence is plaintiff's presently conceived desire to send her child to preschool which is not ordinarily considered necessary for a child's welfare and has not been shown to be such in the present case.

It is a rule of long standing that any application for modification of a divorce decree with respect to care, custody, and maintenance of minor children must be founded on new facts which have arisen since entry of the decree. See Hossack v. Hossack, 176 Neb. 368, 126 N. W. 2d 166. In the present instance modification of the decree was sought within 6 months of its entry. Under such circumstances the court has power to vacate or modify the decree. See § 42-340, R. R. S. 1943.

The right to set aside or modify a divorce decree within 6 months is not absolute but must be exercised within a sound judicial discretion. Good reason must be shown for such action. See, Hubbard v. Hubbard, 176 Neb. 768, 127 N. W. 2d 503; Zachry v. Zachry, 185 Neb. 336, 175 N. W. 2d 616. Here we have a stipulation regarding the matter at issue entered into by the parties knowingly, willingly, and with advice of competent counsel. No substantial change in circumstances appears, no deceit is charged or proved, and no good reason for modifying the stipulation and decree is shown. The order modifying the original decree should be reversed.

If the rule mentioned above is not followed, the trial

judge will be at liberty to tinker with divorce decrees at will during the 6-month period following entry of decree.

STATE OF NEBRASKA, APPELLEE, V. GENE H. ROSE, APPELLANT.
195 N. W. 2d 215

Filed March 3, 1972. No. 38107.

1. **Criminal Law: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Attorneys at Law: Appeal and Error.** The record must support the claim of ineffective counsel.

Appeal from the district court for Douglas County: DONALD HAMILTON, Judge. Affirmed.

Gene H. Rose, pro se.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant was found guilty by a jury of having on about May 10, 1970, knowingly and unlawfully sold or offered for sale cannabis, sometimes known as marijuana. He was sentenced to a term in the state penal complex.

Two issues are raised on the appeal: (1) The sufficiency of the evidence to sustain the conviction; and (2) ineffective assistance of counsel by reason of which he was denied a fair trial. At the trial the defendant was represented by counsel apparently of his own choosing. On this appeal the public defender's office was

first appointed to represent the defendant. That office was permitted by the court to withdraw after full compliance with Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493; and State v. Williams, 181 Neb. 692, 150 N. W. 2d 260. The basis of the withdrawal and the order of the court permitting the same was that the appeal was frivolous.

We have carefully examined the record. As to the first assignment there is no merit. The State's evidence established a prima facie case of the sale by the defendant to an undercover agent. The defendant took the stand in his own behalf and denied the transaction. The only question was one of credibility and this the jury has resolved.

As to the second assignment the defendant's position seems to be that his counsel failed to call a witness, Ada, defendant's sister-in-law, to testify that she was not the "Ada" present at the transaction in question as claimed to have been testified to by the undercover officer. There is nothing in the record to establish what this witness' testimony would have been. If her evidence would have been helpful surely the defendant himself could have arranged for her appearance as a witness in his behalf. We cannot assume that counsel would fail in a matter so obvious. The record of the trial reveals no ineffectiveness or incompetency of counsel.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED L. KIMES, APPELLANT.
195 N. W. 2d 216

Filed March 3, 1972. No. 38111.

Criminal Law: Guilty Plea: Plea Bargaining: Sentences. Under the circumstances in this case, where the plea of guilty was induced in part by a misunderstanding as to the recommendation the county attorney would make at the sentencing hearing,

the sentence is vacated and the cause remanded for resentencing.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Sentence vacated; cause remanded for resentencing.

Merrell L. Andersen, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant was convicted of second degree murder upon a plea of guilty and sentenced to imprisonment for 40 years. The appeal challenges the validity of the sentence.

The defendant was originally charged in two counts with murder in the first degree. At the arraignment on October 2, 1970, the defendant pleaded not guilty. On November 25, 1970, the information was amended to charge murder in the second degree and defendant entered a plea of guilty. Before accepting the plea the district judge advised the defendant fully as to his rights; determined that there was a factual basis for the plea; and that the plea was entered voluntarily and understandingly. At this hearing, in response to an inquiry by the court, the defendant stated that there had been no plea bargaining.

At the hearing on sentencing, held on December 23, 1970, the defendant testified as to the circumstances of the crime. He had been renting an apartment from the deceased, Minnie M. Kaminska, who was 81 years of age. A dispute arose over a refund of rent when the defendant was asked to vacate. Mrs. Kaminska refused to refund any part of the rent, the defendant struck her on the head several times with a length of pipe, and took the money from her purse. The State produced addi-

tional evidence concerning the crime and the defendant's criminal record.

The statements of counsel made at the conclusion of the evidence do not appear verbatim, but the record shows that the county attorney recommended a sentence of imprisonment for 50 years. Following the statements of counsel, the trial court imposed the sentence of imprisonment for 40 years.

Immediately following the hearing, a conference was held in chambers where counsel for defendant stated to the court, for the first time, that there had been a plea bargain and that it had been violated. The county attorney acknowledged that there had been an agreement between counsel but denied that there had been any violation of the agreement.

A motion for new trial was filed and an evidentiary hearing held on the motion. At this hearing the defendant's counsel testified that it was their understanding that in return for the defendant's plea of guilty to second degree murder, the county attorney would recommend a sentence for a definite term of years as opposed to a life sentence. If asked by the trial court for a recommendation as to the length of the term, the county attorney would recommend a sentence of 40 years.

The county attorney testified that it was his understanding he was free to recommend a sentence for a stated number of years; that a 40-year sentence had been mentioned during an earlier conference; and that at the final conference he had told the defendant's counsel any recommendation made would be in a high range of years.

It is apparent from the evidence that there was a misunderstanding between counsel as to the terms of the plea bargain. The question to be determined is whether this affords any basis for granting the relief the defendant requests.

Upon the facts presented it is difficult to see where there was any substantial prejudice to the defendant.

The recommendation was to be imprisonment for 40 years. The sentence imposed was imprisonment for 40 years. The motion for new trial was heard before the sentencing judge, and after being fully advised as to the facts and contentions of the defendant, the motion was overruled.

In Santobello v. New York, 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, decided December 20, 1971, the United States Supreme Court vacated the sentence where there had been a breach of the plea bargain. The defendant had agreed to plead guilty to a reduced charge in return for a promise that the prosecutor would make no recommendation as to sentence. At the sentencing hearing a new prosecutor recommended the maximum sentence of 1 year. Upon protest by the defendant, the judge stated that without regard to any recommendation by the prosecutor, the facts disclosed in the probation report required that the defendant be sentenced to imprisonment for 1 year.

The Supreme Court held, in effect, that prejudice to the defendant was not a controlling circumstance. The court stated: "* * * when a plea rests in any significant degree on a promise or agreement of the prosecutor, * * * such promise must be fulfilled." The court further stated: "We need not reach the question whether the sentencing Judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration."

Although the record here does not show a clear breach of a plea bargain, it does show that the plea was induced in part by a reasonable misunderstanding of the

plea bargain. Under all the circumstances, we conclude that the cause should be remanded to the district court for resentencing. For the purpose of that hearing we resolve the dispute concerning the terms of the plea bargain in favor of the defendant. The county attorney shall make no recommendation for imprisonment in excess of 40 years.

The sentence imposed by the district court is vacated and the cause remanded for resentencing.

SENTENCE VACATED; CAUSE REMANDED FOR RESENTENCING.

GORDON R. PHILLIPS, APPELLEE, V. SUE M. PHILLIPS, APPELLANT.
195 N. W. 2d 160

Filed March 3, 1972. No. 38128.

1. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Trial.** If the circumstances of the parties change and it is in the best interests of the children, the court may from time to time revise or alter a divorce decree so far as custody, care, and maintenance of children is concerned.
3. **Divorce: Parent and Child: Appeal and Error.** In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Robert C. Vondrasek, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This action presents a question of child custody. On April 17, 1961, plaintiff Gordon R. Phillips obtained a decree of divorce from defendant Sue M. Phillips. Custody of two minor daughters was awarded to defendant. By decree entered April 16, 1971, custody of the children was awarded to plaintiff. We affirm the judgment of the district court.

We have examined the record in this case and find it strongly supports the judgment entered. It would serve no good purpose to detail the facts therein revealed. Suffice it to say that defendant has consistently failed to maintain a home for the children which was free of immorality and has not given the children adequate care and attention. On the other hand, plaintiff, a sergeant in the U.S. Air Force, has remarried, has one child by his second marriage, and has at all times appeared to be a fit and proper person to have the custody of his minor daughters.

In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children. See Bauer v. Bauer, 184 Neb. 777, 172 N. W. 2d 231.

If the circumstances of the parties change and it is in the best interests of the children, the court may from time to time revise or alter a divorce decree so far as custody, care, and maintenance of children is concerned. See Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262.

In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion. See, State v. Randall, 187 Neb. 64, 187 N. W. 2d 586; Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647.

A change in custody was necessary to promote the best interests of the children and no abuse of discretion appears.

The judgment of the district court is affirmed and the request of defendant for additional attorney's fees is denied.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEROY CASADOS, APPPELLANT.
195 N. W. 2d 210

Filed March 3, 1972. No. 38161.

1. **Criminal Law: Jury: Constitutional Law.** The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible.
2. ———: ———: ———. A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn.
3. **Criminal Law: Jury: Trial: Evidence.** It does not become the burden of the State to establish that there was no discrimination in jury selection until at least a prima facie case of discrimination has been established.
4. **Criminal Law: Trial: Evidence.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
5. **Criminal Law: Intent: Trial: Evidence.** Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
6. **Criminal Law: Trial: Evidence.** Proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.
7. **Criminal Law: Prosecuting Attorneys: Trial.** It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty he may be.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Charles F. Fitzke and James T. Hansen, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant, Leroy Casados was convicted of child stealing and sentenced to 3 to 5 years imprisonment.

The "child," who was the State's chief witness, was a female not quite 18 years old at the time she ran away from home. She met the defendant several months before while she was working part-time as a waitress at a cafe in Minatare, Nebraska, her home. The defendant, Leroy Casados, was 28 years of age and worked with his brother in a garage. The complaining witness testified that she told the defendant some of her problems from time to time, including problems with her family. These conversations occurred at the cafe where she worked.

Sometime in late September 1970, the defendant told her that he was going to Denver in a few days and offered to take her to Colorado and help her get started there. She decided to leave home. On the morning of October 2, 1970, she drove to Scottsbluff, Nebraska, left her car in a hospital parking lot, and left Nebraska with the defendant in his car. She testified that up to this time everything was done of her own free will, and she went with the defendant willingly. They drove to Cheyenne, Wyoming, and spent the night with friends of the defendant. The next day they drove to Denver, Colorado, where they stayed for approximately one month with Louise Trujillo, a sister of the defendant. During this period, the defendant Casados was gone for days at a time. In early November of 1970, the complaining witness moved to the apartment of Carol Stoner in Lakewood, Colorado, a suburb of Denver. While there, the complaining witness got a job as a waitress for a few days. On November 25, 1970, the defendant agreed to

drive her home. He took her to Kimball, Nebraska. She called her parents, who came and picked her up there.

The complaining witness had many opportunities to go home or to let her whereabouts be known. She did not at any time during her absence communicate or attempt to communicate with her parents.

The defendant was charged with child stealing under section 28-418, R. R. S. 1943. The relevant portion of that statute reads as follows: "Whoever maliciously or forcibly or fraudulently leads, takes or carries away or decoys or entices away any child under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parents * * * shall be imprisoned * * *." That statute has remained unchanged since 1901.

The defendant first asserts that Mexican-Americans have been systematically excluded from service on juries in Scotts Bluff County, Nebraska. We have recently held that the Nebraska system of selecting jurors is clearly within constitutional limits and that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. See State v. Gutierrez, 187 Neb. 383, 191 N. W. 2d 164. Here there is no evidence to establish that a Mexican-American surname is an accurate criteria for measuring the percentage of the class in the general population. There is also no information whatever as to the number of Mexican-American surnames on voter registration lists from which jury panels are drawn. While figures as to school populations may have some rough significance, there is no evidence to establish its relationship to general population data. The fact that over a period of 4½ years only 8 out of 439 persons on jury panels in Scotts Bluff County had Mexican-American surnames is insufficient to establish even a prima facie case of discrimination in jury selection in the absence of a specific showing as to the percentage of Mexi-

can-Americans on the voter registration lists. Neither does it become the burden of the State to establish that there was no discrimination until at least a prima facie case of discrimination has been established. See Turner v. Fouche, 396 U. S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567.

The defendant was charged with the crime of child stealing, committed on October 2, 1970. The essence of the crime was maliciously taking or carrying away, with intent to unlawfully detain or conceal the "child" from her parents. On a number of occasions throughout the trial, the State elicited from the complaining witness testimony that after the defendant had driven her out of the State of Nebraska on October 2, he committed other specific crimes over a period of some 7 weeks thereafter. There were vigorous objections on the part of the defendant's counsel and various motions for mistrial were made. They were overruled and the evidence admitted. The county attorney and the court indicated outside the presence of the jury that the evidence as to those crimes was admissible for the purpose of proving the necessary intent for the crime of child stealing. There was no indication to the jury that the evidence was being received only for that limited purpose. The evidence also involved some instances of sexual intercourse without force. There is no showing as to the age of consent in Colorado and even if we should indulge the presumption that the law is the same as in Nebraska, there might or might not be a crime involved. Our discussion is limited to the evidence of crimes other than the specific crime charged.

As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. See State v. Easter, 174 Neb. 412, 118 N. W. 2d 515.

In many instances, courts have limited such evidence

to proof of prior similar acts. Other courts have extended it to include similar acts occurring after the particular crime charged, provided there was at least one former act. In any event, proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.

"Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defendant is guilty of the offense for which he is being tried. * * * One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged." 1 Jones on Evidence (5th Ed.), § 162, p. 290. See, also, 2 Wigmore on Evidence (3d Ed.), § 302, p. 200.

Here the evidence of other distinct crimes after October 2, 1970, might be relevant to establish malice or the necessary intent to constitute the crime of child stealing. The complaining witness testified that the defendant committed forcible rape and forcible sodomy on two or three occasions. In view of the extensive testimony as to other sexual conduct between the defendant and the complaining witness over a 7-week period which the jury was permitted to consider, there is serious question as to whether this uncorroborated testimony as to these two crimes was relevant to establish the specific malice or intent required for the crime of child stealing with which he was charged, or whether it was introduced to establish that the defendant was a "bad man." The connection and relevance of such testimony should be weighed carefully by the trial court in view of the general rule excluding evidence of other crimes.

The evidence here also included testimony of the com-

plaining witness charging the defendant with possession, procuring, furnishing, and using several different kinds of illegal drugs on various occasions. Clearly this evidence could not ordinarily establish the necessary malice or intent for the crime of child stealing with which the defendant was charged, nor did it tend to establish any essential fact in issue. In the context of this record, this testimony was inflammatory and had no proper relevance to establish the commission of the crime for which the defendant was charged. The rule excluding such evidence of other independent crimes is one of the distinguishing features of our common law jurisprudence and it rests on fundamental demands for justice and fairness which nourish the roots of our whole system of justice. The admission of this evidence was prejudicial and requires reversal.

The defendant also asserts that the remarks of the prosecutor in final argument to the jury were improper, misleading, and prejudicial to the extent of constituting misconduct and depriving the defendant of a fair trial. The State's response is to assert that where no record is made of the closing arguments at trial, a conviction should not be set aside on the ground of improper statements of the prosecutor in closing argument. In this case, however, while no record was made at the time, the parties have stipulated as to what occurred during final argument, and that stipulation is before us as part of the bill of exceptions. The record reveals that during his final argument, the prosecutor referred to the defendant as a "despicable" person, to which objection was made; that the county attorney argued that the evidence showed the defendant was the most lowly person the jury would have occasion to judge, to which objection was made; and that the prosecutor during final argument argued that the evidence showed the defendant was a pimp and that the evidence showed what a pimp was, to which objection was also made. In each instance, the court merely admonished the jury

that it was to disregard any statement made by counsel which was not supported by the evidence. It is specifically stipulated that in no case did the court direct the jury to disregard any of the remarks made by the prosecutor but that he did instruct the jury to consider only those remarks supported by the evidence.

Inflammatory or vindictive remarks by a prosecutor during a closing argument often are not considered sufficiently prejudicial to constitute error. It is difficult to analyze the dividing line between prejudice and lack of it. Courts are invariably quick to condemn all such practices, even where they find no prejudice. In this case, the evidence of defendant's guilt of child stealing was not overwhelming. Nevertheless, that was the specific crime with which he was charged and the comments to the jury clearly do not refer to such an offense but to the evidence of other crimes to which reference has already been made. Timely objection was made by defense counsel but the court did not even order the jury to disregard the statements. The trial judge merely directed the jury to disregard any statements not supported by the evidence. In the absence of a strong rebuff by the trial court, the inflammatory nature of the prosecutor's remarks is apparent.

It is a fundamental concept of our criminal law that an accused, whether guilty or innocent, is entitled to a fair trial. It is not only the duty of the trial court but of the prosecutor as well to see that he gets one. A prosecution solidly based upon the law and the facts and supported by sound reasoning does not require bolstering by appeals to passion and prejudice. The argument here clearly violated one or more of the subsections of Standard No. 5.8 of the American Bar Association Standards Relating to the Prosecution Function. Part V of the American Bar Association Standards Relating to the Prosecution Function, dealing with the trial and specifically Standards 5.1 to 5.10, inclusive, are appropriate and proper standards and should be complied with by

prosecutors in the trial of criminal cases.

As recently as State v. Smith, 187 Neb. 152, 187 N. W. 2d 753, this court stated: "It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty he may be. * * * Where the defendant has been prejudiced, the conviction will be set aside." While each case must be determined on its own facts, the combination of circumstances here persuades us that the defendant did not receive a fair and impartial trial.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

SPENCER, J., WHITE, C. J., and BOSLAUGH and NEWTON, JJ.

We join in the opinion of the court, with the understanding that the evidence of the sexual relations of the defendant with the child were admissible to prove motive.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM T. MELOY, APPELLANT.
195 N. W. 2d 173

Filed March 3, 1972. No. 38181.

Criminal Law: Sentences: Appeal and Error. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

The defendant, William T. Meloy, pleaded guilty to one count of drawing and uttering an insufficient funds check with intent to defraud. After a full evaluation, the district court sentenced the defendant to the Nebraska Penal and Correctional Complex for a period of 2 to 5 years. The sole contention on appeal is that the sentence was excessive.

The record reveals that the defendant was 24 years old. He joined the Army in February 1968. His criminal record began in July of 1968, when he was convicted on a felony charge of false swearing and received a 1-year suspended sentence in Atlanta, Georgia. A few months thereafter he was charged with grand larceny at Tampa, Florida, but the case was nolle prossed and he was released to military authorities. In 1969, he was arrested on worthless check charges in Columbia, Tennessee, and at about the same time he was charged with desertion from the Army. In March 1971, he was arrested in Jackson, Mississippi, on a charge of false pretenses. The check involved here was issued in January 1971. An additional count for the issuance of another check in Hall County was dismissed before the guilty plea here. There were four or five hold orders on the defendant at the time of sentencing, including at least two from other counties in Nebraska, and one from the Army.

Under such circumstances, it is quite apparent that there was no abuse of discretion on the part of the trial court and that the sentence here was not excessive. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion. State v. Leadinghorse, 187 Neb. 386, 191 N. W. 2d 440.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. DAVIS, APPELLANT.
195 N. W. 2d 175

Filed March 3, 1972. No. 38195.

Appeal from the district court for Douglas County: DONALD HAMILTON, Judge. Affirmed.

Thomas P. Lott, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALOYSIOS MONROE, APPELLANT.
195 N. W. 2d 159

Filed March 3, 1972. No. 38206.

Criminal Law: Appeal and Error: Evidence. This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a prosecution for drunken driving in which the defendant's only contention on appeal is that the evidence is insufficient to submit to the jury the question of whether he was actually operating or in actual physical control of the motor vehicle at the time and the place charged in the information.

In other words, the question involved in this case is was the defendant sufficiently identified as the driver of the automobile? There appears to be no dispute in either the evidence in this case or on appeal as to the intoxicated condition of the defendant. The evidence shows that a member of the auxiliary police force of Grand Island, Nebraska, while off duty, was driving north on State Highway No. 281 between Hastings and Grand Island. He observed an older model car driving north and weaving from one side of the road to the other. At the intersection of State Highway Nos. 281 and 34, the car stopped for a flashing red light and the auxiliary policeman pulled up directly behind him. The auxiliary policeman testified that the man driving the front car, the individual on the left-hand side of the car, got out on the *left* side of the car and came back and made an indistinguishable remark to him. This man was identified as the defendant Monroe. The auxiliary policeman then followed the car north on State Highway No. 281 where it pulled into a filling station in Grand Island. At this point, the auxiliary policeman, his wife, and the filling station attendant all observed Mr. Monroe drive into the station, stop, and eventually get out the left-hand side of the vehicle and stagger into the filling station. The defendant had a passenger with him riding on the right-hand side, in the front seat.

This evidence was denied by the defendant. His contention in substance is that a companion, John William Nelson, drove all the way from Alliance, and Nelson testified that he fooled the police by sliding over to the right-hand side of the car because he did not have a

driver's license. This was refuted on rebuttal by the patrolman, and by the auxiliary policeman who testified that Mr. Nelson was seated on the right-hand side, in the front seat, and that he was wearing a large cowboy hat. This testimony was also corroborated by the filling station attendant, who also identified the defendant as he drove into the filling station.

It is obvious that the testimony at a minimum is conflicting and is therefore for the jury under familiar rules. It would further appear from the evidence that the defendant Monroe was the driver of the vehicle is so overwhelming it makes further argument as to the insufficiency of it to go to the jury a simple exercise in frivolity. The case was properly submitted to the jury and the judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH COTTONE, APPELLANT.
195 N. W. 2d 196

Filed March 3, 1972. No. 38233.

Criminal Law: Sentences: Probation and Parole: Appeal and Error. In imposing sentence and denying probation in a criminal case the judgment of the district court will not be disturbed on appeal unless the record shows an abuse of discretion.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Eugene T. Atkinson of Atkinson & Kelly, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Randall E. Sims, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a criminal case, where the defendant pled guilty to the amended information which charged him with arson in the fourth degree. The court sentenced the defendant to a term of 18 months to the Division of Corrections of the Department of Public Institutions of the State of Nebraska. The defendant appeals contending that the sentence was excessive. We affirm the judgment and sentence of the district court.

As the defendant himself concedes, the district court in this case gave extremely careful and conscientious attention to the requirements of the law in receiving the guilty plea and in according the defendant a full presentation of his contention with reference to the matter of the amount of the sentence. The bill of exceptions of the testimony in this case stretches to 56 pages and reveals a detailed examination by counsel and by the court itself in all of the pertinent circumstances necessary for the court to make its determination.

The only contention that is argued in the defendant's brief is to the effect that the 82nd Nebraska Legislature enacted L.B. 680, effective August 27, 1971, which generally accomplished some major changes in the probation system of the State of Nebraska. He argues that it was the intent of the Legislature to give much more "effect" to the system of probation rather than to the system of incarceration. Assuming this to be true, the defendant fails to point out where this principle has any application to the particular facts and circumstances of his case. The statute contended for, L.B. 680, was not in effect at the time of the sentencing in this case on June 24, 1971. We also observe that section 29-2260(3), R. S. Supp., 1971, section 15 of the act, specifically states the grounds of probation that are listed therein are not controlling of the discretion of the court. Although not argued by the defendant, we briefly review the discretion of the trial court. The court had before it a presentence investigation report, the defendant's current work

situation, social adjustment, past work record, and his previous record of having been in detention in the Boys' Training School at Kearney. Considering the nature of the crime involved, and the danger to the public and the consideration of protection to society, we can find nothing that would indicate in the least an abuse of discretion by the trial court in imposing the sentence that it did after an exhaustive and conscientious determination and deliberation of all of the facts involved. State v. Steinhausen, 180 Neb. 778, 145 N. W. 2d 584; State v. Hylton, 175 Neb. 828, 124 N. W. 2d 230.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARDELL MOORE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. WARDELL MOORE, APPELLANT.

195 N. W. 2d 253

Filed March 3, 1972. Nos. 38246, 38249.

Criminal Law: Appeal and Error. Relief cannot be granted on appeal when it is frivolous and completely lacking in merit.

Appeals from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Wardell Moore, pro se.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant Wardell Moore was charged in two separate informations with two separate and distinct assaults with intent to inflict a great bodily injury. A plea of

guilty was entered to each charge. Separate appeals were taken but consolidated for hearing before this court as they involve identical issues and briefs. We affirm the judgment of the district court in each case.

The record discloses that defendant's constitutional rights were explained to him. He thereafter waived the services of a lawyer and waived a preliminary hearing in each case. This was reaffirmed on his appearance in the district court. Defendant then waived the services of a lawyer in the district court and entered pleas of guilty in each case. At a later appearance, he denied having entered the pleas of guilty, said he had no knowledge of it, and demanded a lawyer. At a still later date, the defendant appeared with his attorney and received concurrent sentences. While the cases were pending, a psychiatric examination of defendant was had pursuant to an order of the court, entered on motion of defendant, and he was found to be mentally competent.

Defendant's allegations that he was denied counsel and that his pleas of guilty were involuntary due to incompetency are frivolous and entirely lacking in merit.

The judgments of the district court are affirmed.

AFFIRMED.

BERNARD L. STAUFFER, APPELLANT, V. C. L. WEEDLUN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
195 N. W. 2d 218

Filed March 10, 1972. No. 38028.

1. **Motor Vehicles: Constitutional Law.** An issued motor vehicle operator's license gives rise to such legal entitlement as may not be taken away without procedural due process.
2. **Motor Vehicles: Constitutional Law: Administrative Law: Statutes: Notice: Hearings.** Due process does not require notice and hearing before an order of revocation is issued by the Director of Motor Vehicles for point violations under sections 39-7,129 and 39-7,130, R. R. S. 1943. In these cases the like-

lihood of error and irreparable harm to the individual is so slight that the compelling governmental interest in removing from the highway drivers who have by a record of convictions demonstrated unsafe driving habits outweighs the need for prior notice and hearing.

3. **Motor Vehicles: Constitutional Law: Administrative Law: Notice: Motions, Rules, and Orders.** The due process of law provisions of the federal and state Constitutions do not in every case prevent an administrative agency from issuing an order affecting the private rights of an individual without formal notice and hearing before such order.

4. **Trial: Constitutional Law: Administrative Law: Courts: Motions, Rules, and Orders.** The due process requirements may under some circumstances be satisfied if full hearing in the courts is available after the administrative order with judicial power to stay irreparable injury pending court hearing.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Phillips & Murphy, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The plaintiff, Bernard L. Stauffer, received from the defendant, the Director of the Department of Motor Vehicles of the State of Nebraska, notice under the provisions of section 39-7,130, R. R. S. 1943, of revocation of his license to operate a motor vehicle. The ground of revocation was the accumulation of 12 or more point violations under sections 39-7,128 and 39-7,129, R. R. S. 1943. The notice of revocation was dated December 30, 1970, and contained the information required by section 39-7,130, R. R. S. 1943. On January 7, 1971, plaintiff, pursuant to the provisions of that statute, filed his petition on appeal in the district court for Lancaster County and that court issued a restraining order and stay of revocation which remained in effect until the

hearing on the merits. After the hearing the district court held the revocation valid and reinstated the order of revocation. Plaintiff then perfected his appeal to this court. We affirm.

The evidence in this case tends to show the present livelihood of the plaintiff depends upon his continued ability to use and drive an automobile in the occupation in which he is engaged. There is no evidence in the record to show the plaintiff in fact was required to physically surrender his license or that he, prior to the trial on the merits, suffered any damage on account of the order of revocation.

The principal issue in this case is whether sections 39-7,129 and 39-7,130, R. R. S. 1943, violate the due process clauses of Article I, section 3, Constitution of Nebraska, and the Fourteenth Amendment to the Constitution of the United States. Plaintiff relies upon Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90, decided May 24, 1971, in which the Supreme Court of the United States held, insofar as is pertinent here: (1) Suspension of an issued driver's license involves state action that adjudicates important interest of the licensee and such license may not be taken away without procedural due process; (2) procedural due process, in connection with suspension of a driver's license pursuant to *state safety responsibility* law, is satisfied by an inquiry limited to the determination whether there is reasonable possibility of judgment in amounts claimed being rendered against the licensee; and (3) except in emergency situations due process requires that when the state seeks to terminate an interest such as a driver's license it must afford notice and opportunity for hearing appropriate to the nature of the case before termination becomes effective. The court in that case held the motor vehicle safety responsibility law of Georgia was unconstitutional because it did not meet the requirements of notice and opportunity to be heard, and the plaintiff here asserts that sections 39-7,129 and 39-7,130, R. R. S. 1943, are

deficient in these same respects. Section 39-7,129, R. R. S. 1943, provides in part: "Whenever it shall come to the attention of the Director of Motor Vehicles that any person has, as disclosed by the records of such director, accumulated a total of twelve or more points within any period of two years, as set out in section 39-7,128, the director shall summarily revoke . . . the license . . .." Section 39-7,130, R. R. S. 1943, provides that within 24 hours after revocation the Director of the Department of Motor Vehicles shall notify the person of such revocation and this statute prescribes the manner of service and the contents of such notice. This section also provides that if the person fails to surrender the license as directed the Director shall forthwith direct any peace officer or authorized representative of the Director to secure possession of such license.

This court has heretofore in a case involving revocation under the motor vehicle Financial Responsibility Act held because an operator's license was not property and because it was a mere privilege the due process clause of the Constitutions did not apply to proceedings for its revocation. Hadden v. Aitken, 156 Neb. 215, 55 N. W. 2d 620, 35 A. L. R. 2d 1003. Such holding is obviously contrary to Bell v. Burson, *supra,* and to the extent that Aitken holds the due process provisions do not apply to proceedings for revocation of a motor vehicle driver's license under the motor vehicle Financial Responsibility Act that case is overruled.

There still remain however the questions whether (1) due process has been satisfied under the facts in this particular case and (2) whether the holding in Bell v. Burson, *supra,* is applicable to revocation for point violation under the aforementioned sections of the statutes.

Since the decision in Bell v. Burson, *supra,* the Supreme Court of the United States has decided on November 9, 1971, Jennings v. Mahoney, 404 U. S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146, a case arising under the financial responsibility law of the State of Utah. In

that case the motorist claimed: "Utah's statutory scheme falls short of these requirements in two respects (1) by not requiring a stay of the Director's order pending determination of judicial review, the scheme leaves open the possibility of suspension of licenses without prior hearing; (2) in confining judicial review to whether the Director's determination is supported by the accident reports, and not affording the motorist an opportunity to offer evidence and cross-examine witnesses, the motorist is not afforded a 'meaningful hearing.'" The court stated: "There is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by Bell v. Burson. This case does not however require that we address that question. The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine witnesses." Jennings v. Mahoney, *supra,* applies here. We hold that under the circumstances of this case the plaintiff was in fact afforded due process.

We also choose to place our holding upon an additional ground. A revocation for traffic violations under the point system of our statutes involves a substantially different situation than revocation under the financial responsibility acts. The financial responsibility acts are founded upon the premise the motorist involved in an accident may be at fault. In Bell v. Burson, *supra,* the court held before the driver's license and registration of the motorist could be revoked there must be a determination made at a hearing "appropriate to the nature of the case" that there is a reasonable possibility he is in fact at fault. It is evident that the danger which the court wishes to guard against was an unreasonable possibility of wrongfully depriving the motorist of a valuable entitlement. Under the point sytem of revocation as established by our statutes, is there a reasonable possi-

bility of error and are the procedural safeguards which are inherent in the system such as afford an opportunity to correct before irreparable damage occurs such errors as might happen? The answers to these questions require an examination of the statutory scheme and an analysis of the possible mistakes against which protection should be afforded under procedural due process.

Section 39-7,128, R. R. S. 1943, prescribes the number of points to be assessed against the licensee for each conviction under the various categories of violations. Section 39-7,129, R. R. S. 1943, as already noted, provides for revocation of the license if there is an accumulation of 12 or more points within a 2-year period. Section 39-794, R. R. S. 1943, specifies the duties of the tribunals in which the traffic conviction takes place with reference to entry of judgment in such case and together with section 39-795, R. S. Supp., 1969, requires the forwarding of an abstract of the convictions to the Director of the Department of Motor Vehicles. Such abstracts must be upon a standard form prepared and furnished to the tribunals by the Director as authorized and required in section 39-796, R. S. Supp., 1969. These standard forms as they were used in this case are in the record. These set forth the date of the violation; the date of hearing; the name and address of the motorist; his date of birth; his operator's license number; the vehicle number; the docket and page number of the proceedings in the court; the judgment of conviction including fine and costs; the plea; a description of the offense; the name of the enforcing agency and the officer's name; the date of any appeal from the judgment or the date the appeal was dismissed if that is the case; and a form of certificate for the judge, clerk, or magistrate to sign.

Every motorist is of course charged with notice of the contents of the statutes specifying the points assessed for the various violations. For every offense he has or is afforded an opportunity for hearing. He therefore is charged by law with knowledge that his license is in

jeopardy and at all times is charged by law with notice of the state of his record as it pertains to the points charged against him.

In the foregoing setting, what are the facts with reference to which error might be made? They would seem to be these: (1) Improper determination of the number of points assessed for a given conviction; (2) incorrectly determining the 2-year period; (3) incorrect addition of the points; and (4) misidentification of the motorist. The information required to be set forth in the abstracts of conviction is entirely adequate to readily determine the matters required. These determinations in the system outlined are simple ministerial matters and are so characterized by the statute, section 39-796, R. S. Supp., 1969, and by this court. Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17. This characterization is more than a mere euphemism. They truly seem to be merely ministerial. While error might occur in one or more of these items, the likelihood certainly is not very great. There is of course in the system no latitude for discretion nor does it require any factual determinations in the judicial, quasi-judicial, or administrative law sense. There are no inferences to be drawn.

We eliminate from consideration, of course, such matters as completely void judgments as would be the case of no process being served upon the motorist and no appearance by him. We also eliminate such things as fraudulent records of conviction or fraudulent abstracts. We are not required to assume on the appeal that any agency of government will indulge in such practices. Cf. Bourjois, Inc. v. Chapman, 301 U. S. 183, 57 S. Ct. 691, 81 L. Ed. 1027.

If errors do occur, or if there should be fraud, or an absolutely void judgment, what remedy is afforded? Section 39-7,130, R. R. S. 1943, provides for an appeal from an order of revocation to the district court and authorizes the judge to stay the order of revocation pending the appeal. This court has also held that the

procedures authorized by section 60-420, R. R. S. 1943, are available. Durfee v. Ress, 163 Neb. 768, 81 N. W. 2d 148. Both procedures contemplate a full evidentiary hearing. Under the statutes no fact finding of the Director is binding on the courts. In this context is due process lacking under sections 39-7,129 and 39-7,130, R. R. S. 1943? We believe not.

We think that in a very real sense the essential facts have been determined in the judicial proceedings in connection with each conviction. In a very real sense the Director acts only ministerially. The result—the revocation—flows from the operation of the statute upon the already judicially determined facts, that is, the series of convictions of traffic offenses. Of these the motorist already has knowledge. Of their effect point-wise he is charged by law with knowledge just as with any other case of knowledge of the law. These circumstances do, in our opinion, make the procedures applicable to revocation of a driver's license for an accumulation of points for traffic offense conviction clearly distinguishable from revocation under the financial responsibility law as in Bell v. Burson, *supra*. The financial responsibility statutes in effect create without any hearing a presumption of fault. This, if we understand the footing of Bell v. Burson, *supra,* is their constitutional deficiency. Such a situation does not exist in the case here involved. We hold that under the statutory scheme of Nebraska no notice and hearing were required before the issuance of the order of revocation.

The Supreme Court of the United States, in Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287, has recently said: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Facist Refugee Committee v. McGrath, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental

interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U. S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also Hannah v. Larche, 363 U. S. 420, 440, 442 (1960). . . . It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing." See cases cited in note 10, p. 263. That court has long recognized that the requirements of due process may vary according to the nature of the interest to be protected and the likelihood of harm to the individual. In Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865, the court, quoting from another case, said: " 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' " See, also, 16A C. J. S., Constitutional Law, § 628b, p. 856. The due process of law provisions do not prevent an administrative agency in every case from issuing an order affecting the private rights of an individual without formal notice and hearing before such order. The due process requirements may under some circumstances be satisfied if full hearing in the courts is available after the administrative order with judicial power to stay irreparable injury pending court hearing. Parker v. Board of Barber Examiners (La. App.), 84 So. 2d 80.

"Apart from statute, the necessity of notice and hearing in an administrative proceeding depends on the character of the proceeding and the circumstances of the case; insofar as generalization is possible, it may be stated as a general rule that notice and hearing are required where an administrative body acts in a quasi-judicial

manner but not where its actions are executive, administrative, or legislative." 73 C. J. S., Public Administrative Bodies and Procedures, § 130, p. 452.

Under the Nebraska scheme the Director acts ministerially. The likelihood of error is small. The compelling public interest in removing from the highways those drivers whose records demonstrate unsafe driving habits outweighs the need for notice and hearing prior to the order to protect the individual against mistake. In this connection the matter must be viewed not as an isolated case but in the collective aspect, that is, the removal of many such drivers from the highways.

Cases such as Francisco v. Board of Dental Examiners (Tex. Civ. App.), 149 S. W. 2d 619, where summary revocation of a dental license followed upon a conviction of a felony involving moral turpitude, are distinguishable upon at least two grounds. First, in the cited case there was the question of whether the felony involved moral turpitude and this requires a separate determination or judgment apart from the conviction itself, and second, the conviction in that case would not have any necessary and immediate relationship to the competence of the individual to practice dentistry hence no direct immediate relationship to the public health. On the other hand, in our case the Legislature has determined, and we believe reasonably so, that a habit of repeated traffic violations has a definite relationship to the fitness of the driver to operate a motor vehicle and hence to the compelling public interest in safety on the highways.

If a ministerial error has occurred or if there is a fraudulent abstract a notice of revocation is void and this may be determined on the appeal. There is in fact no final "taking" until the court review has occurred or the motorist has acquiesced by failing to take an appeal. The following we think is pertinent. Forkosch, Constitutional Law (2d Ed.), § 191, p. 208, says: "The concept of procedural due process, as we have seen, gives to every person the constitutional right to notice and

hearing before his life, liberty or property is finally taken. To this point we have assumed that the agency, in its proceedings, is 'taking' because its findings of fact are binding upon the judiciary when reviewed. Regardless of this finality, and even if it is or is not present a person is entitled only to one fair hearing (adequate notice is assumed) at some point before a final taking. This fair hearing may or may not be in an agency proceeding, as there may be a court or judicial one instead or in addition. Obviously this latter proceeding accords with procedural due process; if the former, then the question is whether procedural due process was given therein. We are not here concerned with substantive rights * * *, so that if all of the required procedural rights are obtained either in the agency, or in the courts on review, or in a combination of both, before a final taking occurs, then no procedural violation has occurred."

The Court of Appeals of Kentucky, in Commonwealth, Dept. of Public Safety v. Thomas (Ky. App.), 467 S. W. 2d 335, may have come to a different conclusion than have we as to the scope of Bell v. Burson, *supra,* for it has applied the principles of that case to void that State's "point" statute because of lack of provision for prerevocation hearing. There are, however, some significant differences between our and the Kentucky statute. There the administrative agency was entrusted with discretion both as to whether the license should be suspended upon conviction and also as to the period of suspension. The details of the statutory scheme are not set forth. We think, however, that the element of discretion is sufficient to clearly distinguish the case. If discretion is to be exercised, it must be based upon some factual basis if it is not to be purely arbitrary and this would of course require notice and hearing.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES LEE BIRDWELL, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. WALTER ALLEN GREEN, APPELLANT.
195 N. W. 2d 502

Filed March 10, 1972. Nos. 38087, 38088.

1. **Officers.** The authority of a de facto officer cannot be challenged by collateral attack.
2. **Criminal Law: Guilty Plea.** A valid plea of guilty in the district court cures any defect that may have occurred in the proceedings before the examining magistrate.
3. **Criminal Law: Sentences: Post Conviction.** Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.

Appeals from the district court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

James Lee Birdwell and Walter Allen Green, pro se.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendants were convicted of burglary upon pleas of guilty. The convictions were affirmed in State v. Green, 185 Neb. 673, 178 N. W. 2d 271, and State v. Birdwell, 185 Neb. 676, 178 N. W. 2d 270. Thereafter the defendants filed separate motions for post conviction relief which were denied on March 22, 1971, without an evidentiary hearing. Since the motions present identical grounds for relief, we consider the appeals together.

The defendants alleged their convictions are void because they were bound over to the district court by an acting county judge whose appointment had expired; their waivers of counsel before the acting county judge were invalid; and the trial court failed to allow them to examine the presentence report.

The acting county judge was at least a de facto officer and his authority cannot be challenged by a collateral attack. See State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72.

The defendants' waivers of counsel and pleas of guilty in the district court were considered in the prior appeals and held valid. State v. Green, *supra;* and State v. Birdwell, *supra.* The pleas of guilty cured any defects that might have occurred in the proceedings in the county court.

The presentence reports could be relevant only to the sentences imposed upon the defendants. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Bullard, 187 Neb. 334, 190 N. W. 2d 628.

The files and records show conclusively that the defendants were not entitled to post conviction relief. The trial court was not required to grant evidentiary hearings or appoint counsel for the defendants in these proceedings.

Subsequent motions filed April 5, 1971, and denied April 16, 1971, are not before us. However, they are subject to the rule announced in State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826.

The judgments are affirmed.

AFFIRMED.

ELLYN L. HOLDEN, SPECIAL ADMINISTRATRIX OF THE ESTATE OF DALE SCOTT HOLDEN, DECEASED, ET AL., APPELLANTS, V. CITY OF TECUMSEH, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

195 N. W. 2d 225

Filed March 10, 1972. No. 38090.

1. **Municipal Corporations: Annexation: Ordinances.** Annexation ordinances may be considered at special meetings of the city council in the absence of a statutory provision to the contrary.

2. **Municipal Corporations: Annexation: Ordinances: Notice: Constitutional Law.** Annexation is a legislative matter and there is no constitutional requirement that affected landowners be notified before passage of an annexation ordinance. A failure to give such notice is not a denial of due process of law.
3. **Municipal Corporations: Annexation: Statutes.** Agricultural lands which are urban or suburban in character are subject to annexation under section 17-405.01, R. S. Supp., 1967.
4. **Municipal Corporations: Streets.** The location of city streets is a matter generally within the discretion of municipal authorities.

Appeal from the district court for Johnson County: WILLIAM F. COLWELL, Judge. Affirmed.

Healey, Healey, Brown & Burchard and William B. Brandt, for appellants.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Thomas L. Morrissey, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action to determine the validity of an annexation ordinance of the city of Tecumseh, Nebraska. The plaintiffs are landowners whose property was annexed to the city by the ordinance in question. The defendants are the city and its mayor and councilmen.

The district court found that the ordinance was valid. The plaintiffs appeal, contending that the ordinance was invalid because it was considered and adopted at special meetings of the city council without notice to the plaintiffs and because their land was not subject to annexation.

The plaintiffs contend that section 17-405(2), R. S. Supp., 1967, requires that annexation matters be considered only at regular meetings of the city council. The statute cited relates to voluntary annexation by resolution upon the request of owners and inhabitants. Section 17-405.01, R. S. Supp., 1967, provides that the mayor

and council of a city of the second class may by ordinance "at any time" annex contiguous or adjacent lands which are urban or suburban in character and not agricultural lands which are rural in character. There was no statutory provision which prevented consideration of the annexation ordinance at special meetings of the council.

The evidence shows that the members of the council were notified of the meetings but there was no public notice of the meetings other than a notice posted on the door of the city hall. Section 84-1402, R. S. Supp., 1967, was not in effect at the time of the meetings in question.

Annexation is a legislative matter and there is no constitutional requirement that affected landowners be notified before passage of an annexation ordinance. Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776. A failure to give such notice is not a denial of due process of law.

The principal issue presented by the appeal is whether the land referred to as the Holden tract was subject to annexation. The Holden property is a rectangular tract of land located generally in the northeast quarter of Section 28, Township 5 North, Range 11 East of the 6th P.M. It has an area of 146 acres. The other tracts involved are relatively small and most are used for residential purposes.

The plat of the original town of Tecumseh was located in the south half of Section 28. The city developed largely to the north from the original town so that it eventually formed an L-shaped configuration bordering on the south and west of the Holden tract. The Tecumseh public schools are located adjacent to the southwest corner of the Holden tract. The Johnson County courthouse, which is situated on the town square, is approximately 2 blocks south and 2 blocks west of the southwest corner of the Holden tract. State Highway No. 50 runs along the east side and through a part of the

Holden tract. U.S. Highway No. 136 runs along the north side of the Holden tract.

Expansion to the south and west is limited by the Nemaha River and its flood plain. As a result there has been some residential and commercial development to the north and east of the Holden tract. The effect of the annexation was to change the city from an L-shaped area to an area more rectangular in shape and to include areas adjacent to the former limits where development was taking place.

Although the principal use made of the Holden tract is for agricultural purposes, the evidence shows that its value for residential or commercial use exceeds its value as agricultural land. Because of the development of the city it has become urban or suburban in character rather than rural. Thus, it was subject to annexation under section 17-405.01, R. S. Supp., 1967. See, Sullivan v. City of Omaha, 183 Neb. 511, 162 N. W. 2d 227; Voss v. City of Grand Island, 186 Neb. 232, 182 N. W. 2d 427.

The ordinance contained a provision that the owners of the land annexed were compelled to lay out streets, ways, and alleys in and through the property in conformity with and contiguous to the streets, ways, and alleys of the city. This provision merely requires that streets, ways, and alleys, when laid out, shall conform generally to those already established in the city. The location of city streets is a matter generally within the discretion of municipal authorities. See 10 McQuillan, Municipal Corporations (1966 Rev. Ed.), § 30.21, p. 656.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN REEDER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JOHN REEDER, APPELLANT.
195 N. W. 2d 509

Filed March 10, 1972. Nos. 38093, 38094.

Appeals from the district court for Platte County: C. THOMAS WHITE, Judge. Reversed and remanded with directions.

George H. Moyer, Jr., of Moyer & Moyer, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

PER CURIAM.

The nature of this case and the essential facts are set forth in the opinions of Clinton, J., and Newton J., which follow. Since the court is evenly divided with three votes for each opinion and one vote for reversal without concurrence in the opinion of Clinton, J., the judgment below is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., concurring.

State v. Smith, 181 Neb. 846, 152 N. W. 2d 16 (1967), in my opinion is distinguishable. It implies that the 1-year period of suspension ran prior to issuance of the Missouri license to Smith. It also implies that Smith failed to obtain an insurance policy. Under rules of stare decisis my going behind the fact basis of the majority opinion in Smith to reexamine records or briefs would be futile. See, County of Madison v. School District No. 2, 148 Neb. 218, 27 N. W. 2d 172 (1947); International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620 (1945).

In the present case the Colorado license was issued to Reeder subsequent to the 1-year period of suspension.

He possessed an insurance policy with coverages equal in amount to those required by the financial responsibility law. See, Laws 1959, c. 299, § 1 (10), p. 1123; former § 60-501 (10), R. R. S. 1943.

I therefore concur with the Per Curiam opinion.

CLINTON, J.

These cases were tried, briefed, and argued together, and involve identical issues. The defendant was convicted in the district court for Platte County on two separate charges of driving while his motor vehicle operator's license was under suspension. § 60-418, R. R. S. 1943. The cases were tried upon a stipulation of facts and present only a question of law.

On April 12, 1968, the defendant had been convicted of driving during suspension of his operator's license and his driving privileges and license were suspended for a period of 1 year from that date. In August 1968 the defendant moved from Butler County, Nebraska, which was then his residence, to Arapahoe County in the State of Colorado where he resided until about January 1, 1970. On about April 12, 1969, the defendant was notified by the Department of Motor Vehicles of the State of Nebraska that he was eligible to have his driver's license reinstated upon compliance with the financial responsibility laws and payment of the $25 reinstatement fee. On May 6, 1969, being then a resident of Colorado, he obtained a Colorado operator's license by passing the required examination. It was stipulated that the license which he so procured was in full force and effect on February 12, 1970, and February 20, 1970, which are the pertinent dates in these prosecutions. At the time of the issuance of the Colorado license he had been issued and there was in effect a policy of liability insurance with limits of $10,000, $20,000, and $5,000. He never paid to Nebraska any reinstatement fee nor did he attempt to procure a Nebraska motor vehicle operator's license.

When the defendant returned to Nebraska about Janu-

ary 1, 1970, he apparently stayed here continuously until the time of the offenses charged on February 12 and February 20, 1970.

The defendant was clearly guilty of a violation of section 60-410, R. S. Supp., 1969, which requires a nonresident to obtain upon a continuous residence in Nebraska for 30 days a Nebraska driver's license and limits the privilege of operating on a foreign operator's license to that 30-day period. The question is whether the defendant is under the facts guilty of violating section 60-418, R. R. S. 1943.

When the defendant procured a valid Colorado operator's license the suspension in Nebraska had expired. In State v. Smith, 181 Neb. 846, 152 N. W. 2d 16, this court under a similar set of facts affirmed the conviction of a driver, a resident of Missouri, who was temporarily driving a motor vehicle in this state and had no residence herein. I conclude that State v. Smith, *supra,* was wrongly decided and insofar as inconsistent with this opinion ought to be overruled. The prosecutor who handled these cases in the court below is not subject to any criticism for having filed what I consider to be the wrong charges because he was entitled to rely upon our opinion in State v. Smith, *supra.*

The effect of State v. Smith, *supra,* was to say that a driver whose license has been suspended or revoked in Nebraska may never again drive in Nebraska until he has procured a Nebraska license and complied with the motor vehicle financial responsibility law, even though he may have established residence elsewhere and after the period of suspension procured a valid license under the laws of the state of his residence. In summary even though he might be passing through this state as a tourist 20 years after the suspension he would still be guilty of violation of section 60-418, R. R. S. 1943. I have reexamined the pertinent Nebraska statutes and conclude they do not authorize or require such a result.

An examination of Chapter 60, article 4, R. R. S. 1943, clearly shows the statutes do not contemplate the issuance of a Nebraska license to nonresidents. § 60-403, R. R. S. 1943. It clearly contemplates that nonresidents may operate in Nebraska on their nonresident licenses until "a period of thirty days continuous residence" in this state has expired. § 60-410, R. S. Supp., 1969.

Nebraska may of course suspend a nonresident's privilege of driving in this state, § 60-422, R. R. S. 1943, and under the provisions of section 60-418, R. R. S. 1943, neither a "resident or nonresident whose operator's license or right or privilege . . . has been suspended" in Nebraska may operate under a "license, permit . . . issued by any other jurisdiction or otherwise . . . until a new license is obtained when and if permitted under this act." The only reasonable construction of this provision is to say that it contemplates as far as a nonresident is concerned issuance of a license to him in his own jurisdiction after the suspension period and which license is then valid in this state.

As already noted, I believe the statutes do not authorize or contemplate the issuance of Nebraska licenses to nonresidents until they have residence here and that residence continues or is intended to continue beyond 30 consecutive days. Statutes must be so construed if possible as to render them constitutional. If a nonresident, including a former resident of Nebraska who has become a nonresident, whose license or privilege has been suspended or revoked in Nebraska may not again drive upon the highways in Nebraska after the expiration of the suspension period until he again procures a Nebraska license, which license he cannot procure without again residing in Nebraska with the intention to stay more than 30 days, then Nebraska has in all probability placed an unreasonable burden upon interstate commerce contrary to the provisions of the Constitution of the United States. A construction of the statutes

which gives this result is not justified by the language of the statute itself.

The construction this opinion would place upon the statute conforms to the administrative interpretation placed upon it by the Department of Motor Vehicles of the State of Nebraska which is the agency charged with administering the statute. Weight should be given to the construction placed upon the statute by the department even though such construction is not controlling. Allen v. Morsman, 46 F. 2d 891; Belitz v. City of Omaha, 172 Neb. 36, 108 N. W. 2d 421.

The construction I would place upon the statute is in accord with the construction placed upon similar statutes by the Supreme Court of the State of Washington. State v. Kristofferson, 58 Wash. 2d 317, 362 P. 2d 596. It is also impliedly supported by the decision of the Supreme Court of the United States in District of Columbia v. Fred, 281 U. S. 49, 50 S. Ct. 163, 74 L. Ed. 694, where it was held that *during the period of suspension* the foreign license need not be recognized.

NEWTON, J., dissenting. WHITE, C. J., and SPENCER, J., join in this dissent.

The two cases are identical. They involve convictions for driving a motor vehicle while the operator's license of defendant was suspended.

The driver's license of defendant was suspended for the period of 1 year under the point system on April 17, 1967. On April 12, 1968, he was convicted of operating a motor vehicle while his driver's license was suspended and was placed on probation for 1 year during which time his license was again suspended. On September 5, 1969, the order of probation was revoked and he was sentenced to 30 days in jail, but the 1 year suspension of license was not reimposed.

On August 1, 1968, defendant had moved to Colorado where he resided until January 1, 1970. On April 12, 1969, defendant was notified by the Nebraska Department of Motor Vehicles that he was eligible for rein-

statement of his Nebraska driver's license upon complying with the financial responsibility law and paying the required fee. The Nebraska license was never reinstated but on May 6, 1969, defendant applied for and obtained a license in Colorado. He then obtained insurance of a nature to satisfy the financial responsibility requirements of both states. In the Colorado application, he stated his driving privilege was not then under suspension. The pending complaints are for driving on February 12 and 20, 1970, more than 30 days after his return to Nebraska.

Defendant contends that being a resident of Colorado, he was not eligible to receive a Nebraska license and that Nebraska must give full faith and credit to the Colorado law and license.

Section 60-430, R. R. S. 1943, provides: "* * * any person convicted of operating a motor vehicle in violation of any order of suspension or revocation of * * * license * * *, or after such suspension or revocation *and before reinstatement of the license or issuance of a new one,* shall be punished, * * *." (Emphasis supplied.)

Section 60-418, R. R. S. 1943, provides: "Any resident or nonresident whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act, shall not operate a motor vehicle in this state under a license, permit or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained *when and if permitted under this act.*" (Emphasis supplied.)

Section 60-526, R. R. S. 1943, provides that an operator's license may not be reinstated until proof of financial responsibility is given.

Section 60-531, R. R. S. 1943, provides a means whereby proof of financial responsibility may be given by a nonresident.

Section 60-422, R. R. S. 1943, provides for the sus-

pension of a nonresident operator's license on violation of Nebraska laws and section 60-557, R. R. S. 1943, makes it unlawful for a nonresident to drive in this state if his license has been suspended or revoked. Section 60-527, R. R. S. 1943, provides that when a nonresident's license is suspended or revoked, it shall *remain so* until proof of financial responsibility is given.

Section 60-410, R. S. Supp., 1969, provides a nonresident may operate a motor vehicle in this state without a Nebraska operator's permit for a period not exceeding 30 days continuous residence, but if he "be convicted by any court within the state of violating any of the laws of this state relating to motor vehicles or the operation thereof, he shall immediately thereafter be subject to and required to comply with all the provisions of this act relating to the registration of motor vehicles owned by residents of this state and the licensing of operators of motor vehicles."

Section 60-505.02, R. R. S. 1943, requires the payment of a fee of $25 as a precedent to reinstatement of an operator's license or to obtaining a new one.

Defendant was a resident of Nebraska when his license was suspended. During the period of suspension, he became a resident of Colorado and after expiration of the period of suspension obtained a Colorado license. He again became a resident of Nebraska and had been such more than 30 days before arrest on the pending charges. He did not apply for a Nebraska license and did not comply with the Nebraska requirements pertaining to a showing of financial responsibility and payment of a fee necessary to secure a reinstatement of his license or a new license. Section 60-527, R. R. S. 1943, provides that under such circumstances his license shall remain suspended. It is clear that after 30 days residence in Nebraska, any right he may have had to operate under a foreign license had expired and to get a Nebraska license he had to comply with these provisions. Not having done so, and his Nebraska license

remaining suspended, he was obviously guilty of driving under a suspended license.

Defendant contends he could not, while a nonresident, obtain a new Nebraska license. The contention is without merit. There is no statute of Nebraska prohibiting the issuance of a license to a nonresident or making residency a requirement to obtaining a license. He could have at any time paid the required fee and complied with section 60-531, R. R. S. 1943, pertaining to a showing of financial responsibility. A nonresident who violates the laws of Nebraska while driving in Nebraska is subject to the same penalties, including license suspension, as a resident. The statutes specifically provide for the restoration of a nonresident's suspended or revoked license and he cannot again drive in Nebraska until he has fully complied by furnishing a showing of financial responsibility and paying the required fee. Why should a person who leaves and then returns to Nebraska be favored over both permanent residents and nonresidents? We do not believe the law intends or provides for such favoritism.

Defendant argues that his convictions are in violation of Article IV, Constitution of the United States, requiring each state to give full faith and credit to the acts of other states. We are unable to follow this argument. Defendant obtained a Colorado license by misrepresentation. He denied that his Nebraska license was then suspended. His privilege of driving on a foreign license had expired. Most important, however, is the fact he was driving in Nebraska and thereby became subject to the laws of Nebraska. These laws treat residents and nonresidents exactly alike in regard to the suspension and reinstatement of drivers' licenses. Operation of motor vehicles in Nebraska is exclusively a Nebraska concern in regard to which other states have no voice. It is a subject upon which Nebraska, and Nebraska alone, is competent to legislate. "The full faith and credit clause does not require a State to substitute for its own

statute, applicable to persons and events within it, the conflicting statute of another State, even though that statute is of controlling force in the courts of the State of its enactment with respect to the same persons and events * * *." Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940.

The full faith and credit provision of the federal Constitution may not be used to compel one state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. State Farm Mut. Auto. Ins. Co. v. Duel, 324 U. S. 154, 65 S. Ct. 573, 89 L. Ed. 812.

This case is analogous to State v. Smith, 181 Neb. 846, 152 N. W. 2d 16, wherein we held: "The right to operate a motor vehicle after suspension or revocation is not restored by mere lapse of time. The right to operate thereafter depends upon the receipt of a new license.

"Under section 60-525, R. S. Supp., 1965, a license to operate a motor vehicle remains suspended and revoked until the operator has complied with the financial responsibility laws of this state and has secured a new license as permitted under the motor vehicle laws of this state. * * *

"A resident or nonresident whose operator's license or privilege to operate a motor vehicle in this state has been suspended or revoked cannot evade compliance with the statutes of this state by the expedient of securing a license in another state or jurisdiction."

In District of Columbia v. Fred, 281 U. S. 49, 50 S. Ct. 163, 74 L. Ed. 694, under similar circumstances it was held that the defendant, who had moved out of the District of Columbia to Virginia, after suspension of his driver's license in the District, and had obtained a Virginia license, was still subject to arrest and conviction in the District for driving under a suspended license during the term of suspension. Of similar import is State v. Harkness, 189 Kan. 581, 370 P. 2d 100. See, also,

7 Am. Jur. 2d, Automobiles and Highway Traffic, § 104, p. 671, and § 127, p. 687.

The statutes of Nebraska clearly require an affirmance of this case. It is possible that the Legislature would prefer a limitation of the violation, as regards nonresidents with out-of-state operators' licenses, to the original period of suspension fixed, but that is a legislative matter and any change by this court constitutes judicial legislation.

The judgments of the district court should be affirmed.

STATE OF NEBRASKA, APPELLEE, V. NATHANIEL LAWRENCE HALL, APPELLANT.

195 N. W. 2d 201

Filed March 10, 1972. No. 38127.

1. **Criminal Law: Guilty Plea.** The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. **Criminal Law: Guilty Plea: Confessions: Post Conviction: Attorneys at Law.** A guilty plea motivated by the existence of a coerced confession is not subject to collateral attack where the defendant had counsel unless the counsel was incompetent.
3. **Criminal Law: Guilty Plea: Attorneys at Law: Post Conviction.** When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases.
4. ———: ———: ———: ———. That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing.
5. **Criminal Law: Guilty Plea: Evidence: Trial.** Where the actual verbatim record of the proceedings on taking a plea of guilty has been lost, a reasonably accurate account of what took place established by other evidence is not a "silent record" within the proscription of Boykin v. Alabama.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

David L. Herzog and J. Patrick Green, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is a post conviction proceeding in which the defendant, Nathaniel Lawrence Hall, seeks to challenge his conviction for first degree murder while in the commission of a robbery. On May 7, 1965, the defendant, represented by the public defender's office, entered his plea of guilty. He was adjudged guilty by a three-judge court and sentenced to life imprisonment on June 14, 1965.

An extensive evidentiary hearing was held in this proceeding and the defendant was represented throughout by court appointed counsel. The trial judge made extensive, thorough, and detailed findings of fact and conclusions of law following the evidentiary hearing.

The defendant's first contention was that at the time he was taken before the municipal court shortly after his arrest for the purpose of having bond set, he was not given notice and warnings as to his constitutional rights. At and subsequent to the preliminary hearing, the defendant was at all times represented by counsel. It is conceded that no Nebraska statute or rule requires a defendant be advised of his constitutional rights when bond is set. In the federal courts, Rule 5 of the Federal Rules of Criminal Procedure was not amended to require it at that stage until 1966. The occurrence here arose in 1964. There is no merit to this claim.

The defendant also asserts that a statement was taken from him by the police in the absence of his counsel and that he was substantially motivated to enter his guilty

plea because he had previously given a confession. He also asserts that his counsel was ineffective and incompetent because they did not test the validity and admissibility of his confession and advised him instead to plead guilty. The confession occurred shortly after Escobedo became effective and almost two years before Miranda. The defendant made no request for counsel, nor was he denied counsel and it is quite obvious that under the factual circumstances here Escobedo was not applicable. See, United States ex rel. Harvin v. Yeager, 428 F. 2d 1354 (1970); People v. Doverspike, 382 Mich. 1, 167 N. W. 2d 285 (1969).

The trial court here specifically found that the confession given by the defendant in this case was voluntarily given and in compliance with all necessary requirements existing at the time the confession was given. Even though the confession may or may not have been admissible, the standard was and remains whether the guilty plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162.

It is quite apparent that a guilty plea motivated by the existence of a coerced confession is not subject to collateral attack where the defendant had counsel unless the counsel was incompetent. McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763. As the Supreme Court stated in that case: "His later petition for collateral relief asserting that a coerced confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised, either under the then applicable law or under the law later announced, his plea was an unintelligent and voidable act. The Constitution, however, does not render pleas of guilty so vulnerable."

When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subse-

quently attack the voluntariness of the guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. See Brewer v. Peyton, 431 F. 2d 1371 (4th Cir., 1970).

It should also be pointed out here that the trial court specifically found that defendant's trial counsel were exceptionally skilled by virtue of their years of experience in the office of the public defender. In State v. Workman, 186 Neb. 467, 183 N. W. 2d 911, we quoted from McMann v. Richardson, *supra:* "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts. * * * That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing."

The final issue with which we must deal involves problems arising from the disappearance of the record of what transpired at the time the defendant tendered his plea of guilty to the three-judge panel. At the outset of the post conviction proceedings, extensive efforts were made to obtain the transcript or bill of exceptions containing the actual proceedings before the three-judge court. Counsel and others were unable to find the record of the proceedings or to locate the court reporter who reported them. In the absence of the record, the evidentiary hearing considered the testimony of the defendant as to what occurred and in addition heard the testimony of the presiding judge of the panel which took and accepted the defendant's plea of guilty.

The presiding judge testified that he did not remember verbatim everything that was said on the occasion of taking the plea and sentencing, but he did have and still has a memorandum of the questions asked of the defendant and the sections of the Constitution which he points out and explains in every felony case. He also testified that he did ask those questions and make those

explanations to the defendant at that time. The trial court specifically found the defendant's testimony that he was not advised of anything essential was incredible and unbelievable.

This case, while unusual because of the lost record, does not fall within the proscription of Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. Although the absence of any evidence as to what actually occurred would bring Boykin v. Alabama into play, that is not the case here. We think it wholly unrealistic to determine that the loss of the actual record of proceedings should require the vacation of a guilty plea even where the State has established by other evidence a reasonably accurate account of what took place. Such a record is not a "silent record" even though it speaks with less authority than the verbatim record of the proceedings required under section 1.7, American Bar Association Standards Relating to Pleas of Guilty, previously adopted by this court in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763.

The conclusions of the trial court here are buttressed by the fact that because of the seriousness of the crime, a special three-judge panel was convened, and the acceptance of the plea of guilty was signed by each of those judges. The findings of fact and conclusions of law made by the trial judge in this post conviction proceeding extend over 21 pages of the transcript. Those findings were eminently correct and the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HUBERT R. ETCHISON, APPELLANT.
195 N. W. 2d 498

Filed March 10, 1972. No. 38193.

1. **Criminal Law: Searches and Seizures: Motor Vehicles.** When

the condition of an automobile which is indicative of a criminal offense is in plain sight of an officer looking at the automobile from the outside, an examination is justified and legal.

2. **Criminal Law: Sentences: Appeal and Error.** Where punishment for a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not ordinarily be disturbed unless an abuse of discretion appears.

3. **Criminal Law: Sentences: Appeal and Error: Evidence.** When, in the opinion of this court, a sentence is excessive or not warranted by the evidence, the statute contemplates correction on appeal.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed as modified.

L. W. Jim Weber and Larry F. Fugit, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant was convicted of failing to stop after being involved in an accident resulting in personal injuries. Defendant was traveling south in a northbound lane on a four-lane highway. He struck a northbound motorcycle and injured the driver. He then proceeded south a short distance, turned around, and while northbound, passed the scene of the accident. He did not stop at any time. We affirm the judgment of the district court as herein modified.

The license number of the automobile involved in the accident was obtained at the scene by a witness. It proved to be defendant's. Another witness positively identified defendant as the driver of the car which struck the motorcycle and the make and model of the car. A piece of chrome found at the scene appeared similar to a piece missing from defendant's automobile. The evidence of involvement in the accident and of a failure to stop seems conclusive. As a defense, de-

fendant maintained that he was afflicted with hypertension and high blood pressure which caused him to black out on occasion. He says he was suffering from such an attack at the time of the accident, was unaware of the accident, and has no recollection of it.

Defendant asserts the statute, section 39-762, R. R. S. 1943, is unconstitutional due to vagueness in that the term "injury" is not adequately defined. The statute refers to injury to the person. It is a term in common and accepted use. It is defined as "A hurt or damage done to a man's *person.*" Black's Law Dictionary (De Luxe 4th Ed.), p. 925. It is asserted that a layman may not be able to determine if an injury has been inflicted. Since knowledge that an injury has occurred is an essential element of the offense, it is apparent that this contention is without merit. See State v. Snell, 177 Neb. 396, 128 N. W. 2d 823.

After the accident, officers called at defendant's home, informed him he was suspected of being involved in an accident, and requested him to go to the police station. He did so, accompanied by his family, and on arrival, his wife, at the request of an officer, drove defendant's automobile into the police garage where it was examined by the police. Defendant asserts he was unlawfully arrested at his home without a warrant and that testimony relating to the examination and condition of his automobile was not admissible. There was no illegal search here. The damage to the car was to the outside and readily apparent. If the facts here were to be considered to constitute a search, it is the rule that when the condition of an automobile which is indicative of a criminal offense is in plain sight of an officer looking at the automobile from the outside, an examination is justified and legal. See State v. Rys, 186 Neb. 341, 183 N. W. 2d 253.

Defendant objects to that portion of the instruction which sets out the elements of the offense charged which are as follows: "2. That said defendant knew that the

accident happened and that an injury to a person had been inflicted." We can find no flaw in the instruction. The entire instruction refers to occurrences at the time of the accident and the jury could not have been misled into believing that subsequently acquired knowledge of the accident and injury was sufficient to sustain a conviction.

Defendant also excepts to the instruction given in regard to the credibility and weight to be given the testimony of an expert witness. The court gave the first paragraph of NJI No. 14.55 but omitted the rest. While it may be best to give the full instruction as recommended, the instruction as given has been approved. See, Penhansky v. Drake Realty Constr. Co., 109 Neb. 120, 190 N. W. 265; Christoffersen v. Weir, 110 Neb. 390, 193 N. W. 922; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. Error, if any, was harmless and not prejudicial.

The most serious question deals with the severity of the sentence. In determining whether probation should be granted, and, if a sentence is to be imposed, its severity, there are many factors to be considered. The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. In furtherance of this purpose, it is deemed necessary to mete out punishment as a deterrent to others and to lock up incorrigible criminals. On the other hand, the rehabilitation of criminals is one of society's major safeguards. Among factors meriting consideration are the family ties, age, mentality, education, experience, and social and cultural background of the convicted individual; his willingness to work at honest labor; his past criminal record or law abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any; circumstances aggravating or mitigating the offense; community attitudes toward the offense; and

the individual's potentialities for reform or recidivism.

The present case highlights some of the difficulties encountered by the sentencing judge in such situations. The defendant is a 47 year old man with a wife and three children. He has served 22½ years in the Armed Forces and recently received an honorable discharge. He receives retirement pay and a disability allowance. His wife is a school teacher and following his discharge from the service, defendant has held two responsible positions with private firms. His employers, associates, and acquaintances all speak highly of his character, industry, and integrity. His record is that of a law abiding citizen and the present is his first felony conviction. He is now employed and incarceration will result in his losing his position and render it difficult for him to obtain future employment. It likewise may embitter him and turn one who has been a law abiding citizen in the past into a recalcitrant criminal.

Where punishment for a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not ordinarily be disturbed unless an abuse of discretion appears. See State v. Martin, 185 Neb. 699, 178 N. W. 2d 573. When, in the opinion of this court, a sentence is excessive or not warranted by the evidence, the statute contemplates correction on appeal. See § 29-2308, R. R. S. 1943.

Defendant drove down a left-hand lane and struck a motorcycle, severely and permanently injuring the cyclist's foot. Defendant then turned around and returned past the scene of the accident. He failed to stop, offer aid, or comply with statutory requirements. There is absolutely no evidence of intoxication. Leaving the scene of an accident does not ordinarily involve willful violence or a heinous or vicious act. It is usually inspired by fear rather than a deliberate intent to commit a criminal act.

Defendant has been a good citizen and family man. He has also been industrious. If placed on probation

and permitted to continue as a responsible member of society, it is highly unlikely that he will ever again appear before the bar of justice. Under the circumstances, we believe that both the interests of defendant and of society require that he be granted probation on appropriate terms to be delineated by the trial judge.

As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. REX L. FUSBY, APPELLANT.
195 N. W. 2d 495

Filed March 10, 1972. No. 38199.

Post Conviction: Trial: Evidence. In post conviction cases, the rule is clear that the petitioner has the burden of establishing a basis for relief.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Mark M. Sipple, for appellant.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an appeal from the denial of defendant's motion for post conviction relief under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1969, after an evidentiary hearing. We affirm.

Defendant, on July 10, 1970, pled guilty to the issuance of a check on a bank in which he knew his account was closed. Defendant had previously been in custody on check charges. On February 23, 1970, he

was released from custody when his parents paid off all the checks then held by the county attorney. At that time, the county attorney stated that if other checks were received, dated prior to February 23, 1970, defendant would be given an opportunity to make restitution provided no other checks were received which were written after that date.

On June 8, 1970, defendant was arrested and charged with writing a check on a bank in which he had no account. This check was dated May 30, 1970. On June 26, 1970, the defendant attempted to plead guilty to this charge, but the court refused to accept his plea. Thereafter charges were filed on the check involved herein, which was dated February 12, 1970. Defendant was sentenced thereon after the acceptance of his plea of guilty.

Defendant alleges that his constitutional rights were violated through fear and as a result of mistake and representations amounting to fraud, on the part of the Platte county officials, making his plea of guilty on July 10, 1970, involuntary. There is no merit to defendant's contentions.

Defendant's claim is predicated on the fact that the check on which he was sentenced was dated February 12, 1970, which was prior to February 23, 1970, when the county attorney advised him that he would be given an opportunity to make good other outstanding checks, providing no others were written after that date. It is defendant's contention that sometime within the week following June 26, 1970, he wrote to his parents advising them of his predicament, and delivered this letter to the deputy sheriff to be mailed. His parents testified this letter was never received by them. Defendant contends that he pled guilty to the charge only because he felt that his parents had abandoned him when they did not reply to his letter.

On or about June 9, 1970, the defendant was permitted to call his mother, but his parents, who lived in

an adjoining county, made no attempt to see him. At the time of calling his mother he was charged on the check dated May 30, 1970. After the refusal to accept his plea on June 26, 1970, defendant was told by the deputy county attorney that he was going to be charged with writing a no-account check dated February 12, 1970. This was done, and it was to this charge that defendant entered his guilty plea. The other charge was subsequently dismissed.

Defendant infers that in some way the Platte county authorities suppressed or failed to mail his letter. The trial court specifically found that the Platte county sheriff's office did not decline to mail and did not suppress any correspondence addressed by the prisoner to his parents or to any other person. The deputy sheriff testified that any letters given to him by the defendant were mailed. He had no independent recollection of the letters actually mailed, but was certain that all letters delivered to him were mailed. He did recall mailing a letter to defendant's parents but was unable to testify when this occurred.

The defendant, who was 35 years of age, was represented by competent counsel throughout the proceeding. He had ample opportunity to discuss his situation with his counsel. There certainly was no reason why defendant could not have asked his counsel to communicate with his parents or why he did not do so himself by telephone. The policy of the Platte county sheriff's office was to permit prisoners to use the telephone on reasonable occasions. Defendant had telephoned his parents on June 9, 1970. Defendant admitted he was never refused the use of the telephone but made no attempt after June 9, 1970, to contact his parents in that manner.

We have examined the proceedings and are convinced that there is no basis on which the guilty plea could be held to be involuntary. The fact that defendant was under the impression his parents were ignoring his let-

ter is not a sufficient reason to now set aside the sentence. In post conviction cases the rule is clear that the petitioner has the burden of establishing a basis for relief. See State v. Myles, 187 Neb. 105, 187 N. W. 2d 584. This case is not substantially different on the principle involved from McMann v. Richardson (1970), 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763, in which the United States Supreme Court held that a defendant who pled guilty because of a prior coerced confession was not without more entitled to a hearing on his petition for habeas corpus.

This case is in no way analogous to Santobello v. New York (December 20, 1971), 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, as defendant's counsel suggested on oral argument. There, a promise was made as a part of a plea bargain. Here, there was no plea bargain. Defendant was conditionally given an opportunity to make good the checks issued before February 23, 1970. While he was in custody at that time, he testified no charges had been filed. There is no need to consider whether defendant could acquire a vested right in immunity from prosecution by a promise made by the county attorney because it is evident defendant made no serious attempt to comply with any such alleged agreement.

At the time of his arraignment on June 10, 1970, the trial judge advised defendant of his rights prior to his plea, as well as the range of sentence that could be imposed. The defendant did not bring up the circumstances now urged by him to avoid the plea. In the present hearing, he testified that he did not mention the letter to his attorney although he had visited with his attorney about the previous agreement. His plea of guilty was not only intelligently made with full knowledge of his rights and the consequences of his plea, but the record is conclusive that he entered it knowingly, understandingly, and voluntarily.

At the hearing on July 10, 1970, it was disclosed that the county attorney had received approximately 50

checks written by the defendant for sums ranging from $6 to $50, from various business places in Platte County. At the time of the hearing there were outstanding checks in excess of $300, in addition to the check on which the charge was filed.

The record indicates defendant received the utmost consideration from the trial court and from the Platte county authorities. He was represented by competent counsel who would have contacted his parents if defendant had so requested.

The defendant in fact committed the crime to which he pled guilty on July 10, 1970. His plea was made voluntarily and with full knowledge of the consequences and of the range of sentence that could be imposed by the court. There is no merit to defendant's present contentions. The motion for post conviction relief was properly denied.

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL GEORGE BLOTZER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. GEORGE WILLSON RUTHERFORD, APPELLANT.
195 N. W. 2d 199

Filed March 10, 1972. Nos. 38237, 38238.

1. **Criminal Law: Larceny: Words and Phrases.** Stealing may be defined as a taking without right or leave, with intent to keep wrongfully.
2. **Criminal Law: Larceny: Evidence: Intent.** Evidence that property was taken without right or leave and abandoned at a distant place will sustain a finding of an intent to keep wrongfully.

Appeals from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Bruce Smith, for appellants.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendants appeal from convictions for auto theft. The appeals were consolidated for briefing and argument in this court.

The evidence shows that on May 3, 1971, the defendants took a 1964 Chevrolet automobile owned by Charles Louis Gregory and drove it from Cozad, Nebraska, to a point approximately 15 miles east of Sterling, Colorado. They were apprehended there by a Colorado state patrolman. The defendants had left Manhattan, Kansas, on May 1, 1971, in a stolen automobile which they abandoned in Lincoln, Nebraska. They took another car and drove to Hastings, Nebraska, where they abandoned it and took a third car. They abandoned the third car in Kearney, Nebraska, and took a fourth car which they abandoned in Cozad. The defendants intended to go to California and testified that they would have abandoned the Gregory automobile when it ran out of gas.

The principal assignments of error relate to the intent which is an essential element of the crime. The defendants contend the evidence was insufficient to sustain a finding that they intended to deprive the owner of his property permanently and that the instructions to the jury were erroneous because they did not advise the jury that such an intent was an essential element of the crime.

The statute refers to any person who "steals" an automobile. § 28-522, R. R. S. 1943. Instruction No. 8 defined "steal" as a taking without right or leave with intent to keep wrongfully. This is a commonly understood meaning of the word and has been approved by other courts. See, Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288; Grooms v. State, 85

Fla. 413, 96 So. 296. The instruction conformed to the definition contained in NJI No. 14.10 and was not erroneous.

The principal distinction between automobile theft and the lesser offense of taking an automobile for wrongful use (§ 28-521, R. R. S. 1943) is the intent to keep wrongfully which is an element of automobile theft. Where the property is returned to the owner promptly there may be no basis for a finding of intent to keep wrongfully. Where the property is abandoned at some distant place, after it has served the purposes of the taker, there is some conflict in the authorities as to whether the circumstances will sustain a finding of an intent to keep wrongfully. See, 50 Am. Jur. 2d, Larceny, § 37, p. 197; 52A C. J. S., Larceny, § 27, p. 450. We think the better rule is that abandonment at a distant place presents a question for the jury as to whether there was an intent to keep wrongfully. See State v. Warner, 187 Neb. 335, 190 N. W. 2d 786.

The evidence shows the defendants intended to drive the Gregory automobile as far as they could before abandoning it. When the automobile was recovered at Sterling, Colorado, it had been driven 240 miles and had been damaged mechanically. The motor mounts were broken; the center carrier bearing on the drive shaft was broken; the front wheels were out of alignment; there was but little oil left in the crankcase; and the left rear fender and two pieces of chrome had been damaged. There is nothing in the record to suggest an intention to return the automobile to the owner. The evidence was clearly sufficient to sustain a finding of an intent to keep wrongfully.

The defendants complain the trial court in a preliminary statement to the jury, and the county attorney in his closing argument, used the term "joy riding" when referring to the offense of taking for wrongful use. The term is one in common use and could not have misled the jury. See State v. Eyle, 236 Ore. 199, 388 P. 2d 110,

9 A. L. R. 3d 628. The trial court was not required to give the requested instruction that taking for wrongful use is a serious offense for which an adequate punishment is provided.

The defendants also complain that the sentences of imprisonment for 18 months to 5 years are excessive. The defendants were absent without leave from the military service and were under the influence of drugs at the time they left Manhattan, Kansas. They were on their way to California when apprehended in Colorado and had stolen 4 automobiles before they took the Gregory automobile. In view of these circumstances we are unable to say that the sentences are excessive.

The indeterminate sentences will allow the defendants to be released at a relatively early date if they make a sincere effort at rehabilitation.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE E. ECKSTEIN, APPELLANT.
195 N. W. 2d 194

Filed March 10, 1972. No. 38244.

1. **Criminal Law: Constitutional Law: Powers.** A State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment.
2. **Criminal Law: Constitutional Law: Statutes.** Section 28-743, R. R. S. 1943, is not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate the provisions of the Eighth Amendment prohibiting cruel and unusual punishments.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant, Clarence E. Eckstein, an inmate of the Penal and Correctional Complex, was found guilty by a jury of unlawfully assaulting, threatening, and detaining two guards for the purpose of compelling or inducing the performance of an act by another person. The defendant was sentenced to the minimum term of 10 years as provided by section 28-743, R. R. S. 1943. The defendant's contention on appeal is that section 28-743, R. R. S. 1943, violates the equal protection clause of the Fourteenth Amendment and constitutes cruel and unusual punishment prohibited by the Eighth Amendment.

On September 1, 1970, the defendant, along with several other inmates of the maximum security unit in the Nebraska Penal and Correctional Complex, took and held two guards as hostages for approximately 21 hours for the purpose of exacting several demands from the prison administration. The substance of the evidence was that the defendant held a knife on the hostages and threatened them.

Section 28-743, R. R. S. 1943, provides: "Whoever, being an inmate of any jail or correctional or penal institution, shall assault, threaten, imprison, or detain any person for the purpose of compelling or inducing the performance of any act by such person, or by any other person, shall be guilty of a felony and shall, upon conviction thereof, be imprisoned in the Nebraska Penal and Correctional Complex for a term of not less than ten years nor more than fifty years. Such sentence shall commence upon the termination of the first or former sentence."

The defendant's argument seeks to equate this sec-

tion with general criminal statutes dealing with felonious assault or false imprisonment, which carry penalties of 2 to 15 years and 1 year respectively. On that basis, he urges that the statute here, which applies only to inmates of penal institutions, creates an unreasonable and arbitrary classification, and denies him the equal protection of the laws.

This argument was shot down by this court in State v. Holland, 183 Neb. 485, 161 N. W. 2d 862. That case involved a statute making a simple assault and battery committed by certain prisoners a felony punishable by not more than 5 years imprisonment. The identical offense committed by others was a misdemeanor punishable by imprisonment in the county jail for not more than 6 months. This court held that the classification of those prisoners for special treatment was reasonable and that the statute was not violative of constitutional clauses concerning unreasonable classification, equal protection, or due process.

The defendant's second contention rests on the Eighth Amendment. He contends that a 10 to 50 year sentence is cruel and unusual punishment in proportion to punishments for intrinsically the same type of crime by non-inmate citizens.

We point out that section 28-743, R. R. S. 1943, should be equated with the kidnapping statute, section 28-417, R. S. Supp., 1969, rather than with the felonious assault or false imprisonment statutes as the defendant attempts to do. As applied to the taking of hostages, the language of the kidnapping statute and that of the statute involved here are virtually identical when they define the required intent as being "for the purpose of compelling the performance of any act by such person or by any other person." The penalty for violation of the relevant portion of the kidnapping statute is 3 to 50 years imprisonment, while the penalty for violation of section 28-743, R. R. S. 1943, is 10 to 50 years.

The dangers to society, custodians, and prisoners

which are inherent in administration and control of penal institutions are by now well known to everyone. The legislative classification here was not arbitrary or unreasonable. "A State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment." Skinner v. Oklahoma, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655.

The Holland case primarily involved distinctions as to the maximum periods of imprisonment while this case primarily involves distinctions in the minimum periods of imprisonment. Such differences do not destroy nor change the application of the principals involved. Eighth Amendment attacks, equally with those based on equal protection, must fall. State v. Holland, 183 Neb. 485, 161 N. W. 2d 862, is controlling on all issues here.

Section 28-743, R. R. S. 1943, is not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate the provisions of the Eighth Amendment prohibiting cruel and unusual punishments.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BERT BOOTH, APPELLANT.
195 N. W. 2d 198

Filed March 10, 1972. No. 38266.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Stephen Greenburg, Paul E. Watts, Michael N. Schirber, and Samuel A. Boyer, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The sole question on this appeal is whether the sentence is excessive. On November 24, 1969, the defendant, being represented by counsel, pled guilty to a charge of burglary and was placed on probation for a period of 3 years. On June 7, 1971, he was charged with probation violation. One of the conditions of probation was that he report monthly in person and in writing to his probation officer. At the violation hearing defendant was represented by counsel and it was stipulated that he had not reported during the probation period. The court, after obtaining a presentence report, imposed an indeterminate sentence of 3 to 5 years on the burglary charge. At the violation hearing defendant took the stand himself to present evidence in mitigation.

The defendant at the time of sentence was 20 years old. The record reveals no justifiable reason for failure to make the reports as required. His own evidence shows other violations of the conditions of probation. It also shows violation of a prior probation order on a minor charge and the presentence report indicates a record of juvenile offenses including stealing tires and cars, and escape from the Youth Center at Omaha. The defendant is married and has two small children but was living apart from his family during the time he was failing to report. His stated motive in living apart from his family was to avoid apprehension. He testified that he was making contributions to his family's support as he could.

On the record we cannot say the trial court abused its discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD DUANE JOHNSON, APPELLANT.

195 N. W. 2d 517

Filed March 17, 1972. No. 37879.

Criminal Law: Trial: Instructions. An instruction that the jury is to make no inferences from the fact a defendant did not testify is a cautionary instruction for the benefit of the defendant.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Donald Duane Johnson, pro se.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kamerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The sole question presented in this case is the validity of instruction No. 11 given by the district court. The instruction is as follows: "You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reason in that regard." In Murray v. State, 119 Neb. 16, 226 N. W. 793, the defendant alleged error in the following instruction: " 'You are instructed that the defendant has not testified in his own behalf in this case, as he had a lawful right to do. Nothing must be taken against him because he has not so testified.' " The court approved this instruction. In the recent case of State v. Adams, 181 Neb. 75, 147 N. W. 2d 144, this court approved a similar instruction on the same subject matter.

It is obvious, without further analysis, that there is no merit to the defendant's contention. The instruction was clearly framed in the light of our holdings in Murray and Adams. The instruction did not imply that the

defendant had a duty to testify and the instruction could not have prejudiced the defendant in any way.

The assignment of error is without merit, and the sentence and judgment of the district court are correct and are affirmed.

AFFIRMED.

IN RE PETITION OF ELOISE E. CAIN FOR A WRIT OF HABEAS CORPUS.

ELOISE E. CAIN, APPELLANT, V. DAVID ADAMS ET AL., APPELLEES, RODERICK H. DAVIS ET AL., INTERVENERS-APPELLEES.

195 N. W. 2d 489

Filed March 17, 1972. No. 38033.

Infants: Habeas Corpus: Parties: Trial. **In a child custody action between a grandmother and an aunt, the court will consider the best interests of the child and will make such order for its custody as will be for its welfare.**

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Stephen Greenberg, for appellant.

Fromkin, Fromkin & Herzog, for appellees.

Richard L. Weill of Kutak, Rock, Cohen, Campbell & Peters, for interveners-appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a habeas corpus action to determine the custody of 3-year-old Stephen Mathew Adams, between his grandmother, Eloise E. Cain, and his father, David Adams, and his aunt, Joan C. Davis. Roderick H. Davis and Joan C. Davis intervened seeking custody. The dis-

trict court, after a full hearing, found that both the appellant grandmother and the interveners were fit to have the custody of Stephen Mathew Adams. It further concluded and determined that the best interests of the child as between the grandmother and the interveners were served by granting the custody to the interveners. We affirm the judgment and order of the district court.

Stephen Mathew Adams was 3 years of age, the grandson of the appellant, and the nephew of Joan C. Davis. The natural father, David Adams, has been convicted of manslaughter of the child's natural mother and is presently incarcerated. It would serve no purpose in this opinion to recite in detail all of the testimony introduced. We will recite briefly the pertinent facts. Joan C. Davis is the sister of the natural father. She and her husband, Roderick H. Davis, have been married about 4 years and have a 3-year-old son. Joan was 25 years of age at time of trial and both are college educated. Roderick H. Davis is an agent of the Equitable Life Assurance Society and was earning approximately $15,000 per year. Mrs. Davis is a housewife and mother, is not now working, and was staying at home to care for the children. They live in a west Omaha apartment complex with playground facilities, swimming pool, and grassy areas. There are numerous small children in the neighborhood.

In contrast to this general situation, the appellant, Eloise E. Cain, is 53 years old and resides in Little Rock, Arkansas where her 78 year old mother lives with her. She has been twice divorced, and testified that she would not remarry. She is a Civil Service employee, earning $7,856 a year. Since she is employed, she testified that the minor child would attend a day-care center in Little Rock during the hours she worked.

In this case the court is not faced with the many times onerous problem of weighing the comparative value of parental rights or determining the fitness or unfitness of the custodial applicant. The contestants in this controversy are people of high moral character, and possess

the requisite love and desire for the care of Stephen Mathew Adams. They are financially able to furnish proper food and clothing and the other environmental requirements for the raising, training, and care of Stephen Mathew Adams. We need not investigate any of the fine distinctions present in some of the rules applicable to custody controversies in a habeas corpus proceeding. In a controversy of this nature and between these parties, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare. Steward v. Elliott, 113 Neb. 421, 203 N. W. 580; Reed v. Reed, 152 Neb. 819, 43 N. W. 2d 161; Hausman v. Shields, 184 Neb. 88, 165 N. W. 2d 581.

In weighing the evidence in this case it is quite obvious that the district court, in exercising its discretion, considered the age of the parties and the effect of age on their ability to raise a child of tender years such as Stephen Mathew Adams is. The appellant is 53 years of age and plans to retire at the age of 65 years. Undoubtedly the trial court took into consideration the generation gap between the grandmother and Stephen Mathew Adams and was responsive to the principle that child rearing is a difficult problem in a modern age and such problems are accentuated by an age difference between the child and a custodial grandmother, such as we have here. When Stephen is 15 years of age and a teenager, his grandmother will be 65 years of age. On the other hand, the interveners, Joan C. Davis and her husband, are now just beginning their own family, and are obviously much better equipped over the next 20 years to raise a small child. We feel that one of the considerations impelling the lower court's decision was that when a child grows up with younger people, as here, in a family with other children, it has a better opportunity for a more normal and wholesome development than with people separated from it in age by about 50 years.

See In re Adoption of Jackson, 201 Wis. 642, 231 N. W. 158.

Touching briefly upon home conditions, the differential is apparent in that Mrs. Cain will continue working and the child would have to undergo, at a tender age, the loss of contact with the grandmother for long periods of time. She also described in her testimony that the problem of Stephen's playmates would be taken care of by transporting Stephen across the city to play with children of his own age and maturity. In contrast to this situation, Joan and Roderick Davis have a son, Rick, Jr., who is about 3 years of age and obviously would make a companion of Stephen Mathew Adams as he grew up. It takes no child psychiatrist to speculate about the tremendous advantage of this situation in the rearing of a small child over transporting it across a city to play for short periods of time with other children. Not decisive, but apparent in the record, is the fact that the Davises are now and will be in the future more financially able to furnish Stephen Mathew Adams the support and care necessary in a modern environment, including perhaps more advanced education, than he would probably be able to receive with the grandmother. Considering the other factors of a father figure being present in the home, his being able to live as a member of a happy family unit, and that the Davises would be able to handle much better the perhaps difficult problem of the natural father's visitation in the future, we have no doubt the district court came to the correct conclusion in this case. There is not a scintilla of evidence or argument in this case which would indicate that the trial judge abused his discretion in reaching the conclusion he did.

We have held in matters of this type that the decision of the trial court is peculiarly entitled to respect. It not only saw the parties and the witnesses and was better able to evaluate them, but was in much closer touch with the situation than this court, which is limited to a review of a written record. The judgment of the trial

court in cases of this nature is entitled to great weight in determining the best interests of children in custody proceedings. Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667.

The judgment of the trial court is in all respects correct and is affirmed.

AFFIRMED.

WILLIAM R. BAKER, APPELLEE, V. JOSEPH S. DALY, SPECIAL ADMINISTRATOR OF THE ESTATE OF LEONARD LOUIS DUFFY, APPELLANT, IMPLEADED WITH IDEAL CEMENT STONE COMPANY, APPELLEE.

195 N. W. 2d 755

Filed March 17, 1972. No. 38049.

1. **Trial: Evidence: Jury.** In every case, before the evidence on an issue is submitted to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. ———: ———: ———. A mere scintilla of evidence is not enough to require the submission of an issue to the jury.
3. **Trial: Evidence: Jury: Pleadings.** Where an issue, even assuming that it is properly pleaded, affords no basis for recovery under the evidence adduced in the case, the trial court's submission of such an issue to the jury constitutes error.
4. **Negligence: Motor Vehicles: Pedestrians.** The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

David A. Johnson and Emil F. Sodoro, for appellee Baker.

Joseph P. Cashen, for appellee Ideal Cement Stone Co.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an appeal from a jury verdict and judgment for $17,600 resulting from a pedestrian-automobile collision at an intersection in the City of Omaha, Nebraska. Generally, the appeal raises questions of error in the instructions and the sufficiency of the evidence to sustain the verdict. We reverse the judgment of the district court and remand the cause for a new trial.

A detailed analysis of the facts is not necessary in the light of the disposition we make in the case. For purposes of clarity we recite a general background summary of the evidence. On the day of the accident, September 16, 1968, the plaintiff was employed as a truck driver by the Ideal Cement Stone Company. He and two other employees, returning from a company errand, and each driving a dump truck, stopped for coffee at Harold's Coffee Shop, which is located on the southeast corner of the intersection of Thirtieth and State Streets in Omaha. The men parked their trucks in a line facing south on the west side of Thirtieth Street. The plaintiff's truck was the last in line, and the end of his truck was parked within 10 feet of State Street. The men waited in their trucks a few minutes until a hard rainfall subsided, then crossed the street and entered the coffee shop.

Upon leaving the coffee shop, one of the plaintiff's coworkers walked across State Street to buy a newspaper. The other, Allen Curtiss, jaywalked in a southwesterly direction across Thirtieth Street toward his truck. About the same time, the plaintiff began to cross Thirtieth Street. He testified that he looked first to the south, and seeing no cars, to the north. He saw a car approaching from that direction, but it was about a block away, so he proceeded to cross. The plaintiff testified

that he was in the crosswalk at all times. He safely crossed the northbound lane, and looked again to the north just before he was hit by a car driven by defendant's decedent.

The district court admitted in evidence, over objections, the Omaha city ordinance regulating the right-of-way between vehicles and pedestrians at intersections controlled by automatic signal lights. In the court's instructions, the jury was advised of the ordinance and the issue of the violation of the ordinance was submitted to the jury. There is insufficient evidence to submit this issue to the jury. The plaintiff himself testified there was no traffic light at the intersection. The policeman who investigated the accident and two on-the-scene witnesses, Coyle and Shipley, all testified there was no traffic signal or light at the corner at the time of the accident. The submission of this issue to the jury rests entirely upon the rather uncertain testimony of one of the companions of the plaintiff who was present at the intersection at the time the accident occurred. More important, the city records concerning the installation and position of traffic lights were subpoenaed, and affirmatively show that there was no traffic signal light at the time of the accident, and that in fact such traffic signal light was installed and connected on a date about 1 month after the accident. Applying to this situation the familiar rule applicable to the determination of the sufficiency of the evidence to submit an issue to the jury, we have no hesitation in determining that reasonable minds could not differ in coming to the conclusion that the evidence as to the physical facts establishes conclusively that there was no traffic signal light as provided by the ordinance of the City of Omaha installed and operating at the time of the accident.

It is contended that the testimony of the one witness, which is contrary to what the plaintiff testified to, the police officer, and the official records of the City of Omaha, is sufficient to carry the issue to the jury. This

court has said many times that in every case, before the evidence on an issue is submitted to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. A mere scintilla of evidence is not enough to require the submission of an issue to the jury. Where an issue, even assuming that it is properly pleaded, affords no basis for recovery under the evidence adduced in the case, the trial court's submission of such an issue to the jury constitutes error. Edmunds v. Ripley, 172 Neb. 797, 112 N. W. 2d 385; Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52; Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531; Springer v. Henthorn, 169 Neb. 578, 100 N. W. 2d 521; Buchanan v. Zorn, 169 Neb. 396, 99 N. W. 2d 773; Pullen v. Novak, 169 Neb. 211, 99 N. W. 2d 16; Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254. It is quite obvious that the error was prejudicial, because it permitted the jury to find negligence on the part of the defendant's decedent in violating a signal light, where reasonable minds could not differ that it was not in existence as a matter of physical fact. This was reversible error.

Since the judgment in this case must be reversed, we briefly examine the other assignments of error to the extent necessary for proper submission of the cause on remand. There is evidence in this case that the plaintiff was crossing the intersection in a clearly marked crosswalk, giving him the right-of-way across the intersection under the state statute and the applicable Omaha city ordinance. There is also evidence that the plaintiff in crossing in the crosswalk observed the automobile of defendant's decedent approximately 1 block away. It is the defendant's contention, in essence, that as a matter of law, the plaintiff was guilty of contributory negligence in not again looking and seeing the car in time to avoid the accident. We are of the opinion that this is a

question for the jury under proper instructions. In a closely similar, if not almost identical case, involving a pedestrian crossing at a crosswalk at an intersection in the City of Omaha, this court said as follows in Beck v. Trustin, 177 Neb. 788, 131 N. W. 2d 425:

"Defendant further argues that the plaintiff was guilty of contributory negligence more than slight as compared with any negligence proved against the defendant, and specifically contends that plaintiff's negligence was *in failing to see the automobile of the defendant; in leaving a place of safety and placing himself in the path of the approaching automobile; and in exposing himself to an obvious danger which would have been apparent to him if he had looked.*

"We consider first whether the plaintiff was guilty of negligence more than slight in comparison with the negligence of the defendant. It is defendant's contention that plaintiff did not look to the north before entering the street. The plaintiff's testimony is unequivocal that he did. It is true he made statements on the day of the accident which tend to question his testimony, but this merely made it a jury question, and the jury must have accepted the plaintiff's version. The defendant further contends that the evidence is undisputed that the plaintiff did not look to the north after he had entered the intersection until he had proceeded almost to the center of the intersection where he was struck by the defendant's car. Is this negligence more than slight as a matter of law when compared with the negligence of the defendant? *We determine under the facts in this case that it is not.*

"Section 35.16.010, city traffic code of the Omaha city ordinances, provides in part: ' "a) The driver of any vehicle shall yield the right of way to a pedestrian crossing the street within any marked crosswalk or within any unmarked crosswalk at the end of a block, * * *." * * * "h) Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care

to avoid colliding with any pedestrian upon a roadway, and shall give warning by sounding the horn when necessary." '

"The provisions of 'a' above are substantially the same as those of section 39-751, R. S. Supp., 1963, covering the rights of pedestrians at intersection crossings. The evidence of the only disinterested witness places the defendant's automobile north of the intersection when the plaintiff stepped off the curb. Certainly the jury, under the evidence, could find that plaintiff was in the crosswalk and had the right-of-way when the defendant entered the intersection. * * *

"As pointed out in Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556, before a verdict can be directed against a motorist for failing to see an approaching vehicle at a nonprotected intersection, the position of the approaching vehicle must be undisputedly located in a favored position. Certainly, a pedestrian with a right-of-way is in a much stronger position, and if his right-of-way is to be protected, *we cannot permit the failure to see an approaching car or a misjudgment as to its speed to be the sole criteria. The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. It is no more than evidence from which a jury may find contributory negligence.*" (Emphasis supplied).

The issues of negligence and contributory negligence were properly submitted to the jury under all the evidence in this case. Because of error in the submission of an issue to the jury upon which there was no proper supporting evidence, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

PHILIP F. VERZANI ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
195 N. W. 2d 762

Filed March 17, 1972. No. 38069.

1. **Eminent Domain: Damages.** In an eminent domain proceeding where a part of the property is taken, the landowner may recover the value of the land appropriated and the depreciation in value of the remainder of the land. The remainder is generally considered to be land which is owned by the same proprietor, contiguous to the land taken, and devoted to the same use.
2. ———: ———. In an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in estimating the damages, and the profits of a business cannot be shown for the purpose of proving the value of property.
3. **Eminent Domain: Damages: Pleadings.** Damage claimed to result from improper design or construction of a highway should be pleaded specially.
4. **Eminent Domain: Damages.** Damage related to traffic flow is not compensable.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., Gary R. Welch, Dale L. Babcock, Jr., and Royce N. Harper, for appellant.

Smith, Smith & Boyd and Robert G. Scoville, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding in eminent domain. On August 4, 1969, the defendant, State of Nebraska, condemned 4.85 acres of land in Dakota County, Nebraska, for highway purposes. The land taken was part of a 10-acre tract which was being purchased by the plaintiff Raymond L. Kilberg from Philip F. Verzani and Emma L. Verzani. While the proceeding was pend-

ing, the contract was completed and the land conveyed to Raymond L. Kilberg and Robert C. Kilberg. See Northeastern Nebraska R.R. Co. v. Frazier, 25 Neb. 42, 40 N. W. 604. The vendors have filed a disclaimer in the proceeding.

In the district court the damages were fixed at $27,017. The State has appealed and contends that the trial court erred in permitting the jury to consider certain items of damage.

The principal controversy concerns severance damages. The evidence shows that the 10-acre tract was being used in conjunction with adjacent land lying to the west in the operation of a racetrack known as Raceway Park. The adjacent land consisted of a tract 22 rods wide owned by Raymond L. Kilberg and Darlene Kilberg, and a 1-acre tract owned by Raceway Park, Inc. Raceway Park, Inc., and Robert C. Kilberg were not parties to the proceeding.

Raceway Park, Inc., is a corporation in which 40 percent of the stock is owned by Raymond L. Kilberg, 40 percent by Robert C. Kilberg, 10 percent by Robert Murphy, and 10 percent by Eugene A. Kock. In addition to owning the 1-acre tract of land, the corporation held a lease on the other property. The record indicates that the racetrack; other improvements consisting of bleachers, retaining walls, office building, concession stands, and toilets and washroom facilities; and fencing were located on the 1-acre tract and the 22-rod tract. The 10-acre tract was used as a parking lot.

Over the objection of the defendant, the trial court permitted the plaintiffs to introduce evidence concerning consequential damages to the land and improvements adjacent to the 10-acre tract. The defendant contends that any severance damage should have been limited to the 5.15 acres remaining in the 10-acre tract after the taking.

The rule is well established that where only a part of the property is taken, the landowner may recover the

value of the land appropriated and the depreciation in value of the remainder of the land. The remainder is generally considered to be land which is owned by the same proprietor, contiguous to the land taken, and devoted to the same use. Rath v. Sanitary Dist. No. One, 156 Neb. 444, 56 N. W. 2d 741; Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. As stated in 4A Nichols on Eminent Domain (3d Ed.), § 14.31 (2): "It is, of course, essential to constitute a single parcel that it be owned in its entirety by one owner or one set of owners."

The evidence in this case established a diversity of ownership in the land and improvements adjacent to the 10-acre tract. The facts did not justify a disregard of the corporate identity of Raceway Park, Inc. See Jonas v. State, 19 Wis. 2d 638, 121 N. W. 2d 235, 95 A. L. R. 2d 880. The evidence as to severance damages should have been restricted to that part of the 10-acre tract remaining after the appropriation of 4.85 acres.

The plaintiffs produced an expert witness, Leonard W. Dierking, who testified that the only remainder land damaged was the 5.15 acres. However, he was permitted to testify over objection as to the value of the improvements before and after the taking by a capitalization of income method. The plaintiffs rely upon Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887, and contend that this was a proper method for determining the value of the improvements.

In the Iske case, the witness capitalized royalty income from minerals in place and rental income to be received from the property after the minerals had been removed. In this case the opinion testimony was based upon a capitalization of profits from a business conducted upon the property. The witness used a mixture of assumed amounts and information taken from the books of the racetrack to calculate income before and after the taking.

In an eminent domain proceeding, anticipated profits

from the continued carrying on of a business in an established location cannot be considered in estimating the damages, and the profits of a business cannot be shown for the purpose of proving the value of property. Lechliter v. State, 185 Neb. 527, 176 N. W. 2d 917; James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273. The profits from a business furnish no test of the value of the property upon which the business is conducted because the profits depend to a large extent upon capital employed and the skill of management. 4 Nichols on Eminent Domain (3d Ed.), § 12-3121 (1). The opinion evidence based upon a capitalization of income from the operation of the racetrack should have been excluded in this case even if the value of the improvements had been an issue.

The plaintiffs were also allowed to introduce evidence of damage resulting from failure to properly locate drains under the highway, and damage resulting from a restriction of access due to the separation of opposing traffic lanes of the new highway.

The pleadings raised no issue concerning damage resulting from improper design or construction of the highway, and damage related to traffic flow is not compensable. See, Clary v. State, 171 Neb. 691, 107 N. W. 2d 429; Scheer v. Kansas-Nebraska Natural Gas Co., Inc., 158 Neb. 668, 64 N. W. 2d 333; Painter v. State, 177 Neb. 905, 131 N. W. 2d 587.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SMITH, J., concurring.

The requirement that the condemnee in an eminent domain proceeding must plead damage from improper construction of a highway or other improvement is a product of several rules. A final condemnation award is not conclusive in a subsequent action for remainder

damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding. Recovery in a subsequent suit is permitted because such new element was not contemplated or determined at the time of the taking or damaging. Hansen v. County of Cass, 185 Neb. 565, 177 N. W. 2d 568 (1970). I classify improper design with improper construction and operation.

ABEL CONSTRUCTION COMPANY, A CORPORATION, APPELLANT, V. SCHOOL DISTRICT OF SEWARD, IN THE COUNTY OF SEWARD, IN THE STATE OF NEBRASKA, A CORPORATION, APPELLEE.
195 N. W. 2d 744

Filed March 17, 1972. No. 38075.

1. **Contracts: Damages: Penalties.** As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.
2. ———: ———: ———. If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.
3. ———: ———: ———. Liquidated damages in a fixed sum for each day's delay in performing a construction contract, which in effect grades the damages according to the extent of the breach, and where the effect of the delay is difficult to estimate and the daily amounts are not clearly unreasonable are not penal.
4. **Contracts: Time.** Provisions in construction contracts providing that requests for additional time, necessitated by cause beyond the contractor's control, to complete the contract must be in writing are generally binding.
5. **Contracts: Time: Evidence: Trial: Agency.** There must be evidence to support a finding that the inaction of certain parties for whose actions the owner was allegedly responsible was in fact the cause of the delay in completion of a construction contract.
6. **Contracts: Evidence: Agency.** Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising

from and in accordance with the other's manifestations to such third persons.

7. **Contracts: Time: Damages: Waiver: Agency.** The engineer's authority under terms of the construction contract to observe, inspect, suspend, or reject work, or to make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages.

Appeal from the district court for Seward County: JOHN D. ZEILINGER, Judge. Affirmed.

James W. Hewitt, for appellant.

Blevins, Bartu & Blevins, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action by Abel Construction Company, plaintiff, to recover from the defendant, School District of Seward, $5,175 alleged to be the balance owed upon a contract for the construction of an athletic track with a rubber asphalt resilient surface and other improvements at the Seward high school. The contract provided for liquidated damages of $75 for each day completion of the construction extended beyond the specified 60-calendar day "contract period." The defendant had withheld the liquidated damages for a claimed completion delay of 69 days. The trial judge determined as a matter of law that since the plaintiff had failed to request in writing an extension of the contract period as provided for in the construction contract the only question to be decided was the extent of the delay, and he therefore submitted to the jury the question of whether the contract was completed September 1, 1967, or September 8, 1967. The jury returned a verdict for the plaintiff in the amount of $525. The plaintiff appealed. We affirm the verdict and the judgment.

The plaintiff in its petition pled the contract by the incorporation of a copy thereof, admitted it had not

completed the construction within the time provided in the contract, and alleged that the work was completed September 1, 1967, which was 60 days after the stipulated contractual completion date. It alleged that the delay was excusable because: (a) Rain during the period May 27, 1967, to July 3, 1967, was so far in excess of normal and in such quantity that construction could not take place during that period. (b) The defendant was responsible for a portion of the delay because a testing laboratory hired by the defendant did not complete determination of the "leveling mix" and the "rubber mix" and furnish the same to the plaintiff until June 20 and 23, 1967. (c) The rubber manufacturer's representative was required to be present at the laying of the resilient layer and through no fault of the plaintiff he was not able to be present until July 24, 1967.

The plaintiff further pled that the contractual provision for liquidated damages was void because it constituted a penalty and alleged that the defendant suffered no actual damage because of the delay.

The defendant in its answer pled specifically various provisions of the contract upon which it relied and to which we will refer in this opinion as required, including the failure of the plaintiff to request an extension of time in accordance with contract provisions. In an amended reply filed on the day trial began plaintiff alleged an estoppel to rely upon this contract provision because an employee of the defendant's engineer, one Charles Kemery, had told the plaintiff "not to worry about liquidated damages, as time lost would be adjusted by" the engineer.

The principal issues on appeal as raised by the assignments of error are: (1) Is the contract provision for liquidated damages void? (2) The effect, as related to the matters pled in excuse, of the contract provision requiring that the contractor request in writing extensions of the "contract period" and the effect thereon of the

statement of Kemery. All of which of course reaches the question of the propriety of the partial direction of the verdict by the trial court.

We first discuss the validity of the provision for liquidated damages. The contract provided: "Work shall be commenced within 10 days from the date of the written Notice to Proceed and shall be completed within sixty (60) calendar days after the date of the Notice to Proceed. . . . *Liquidated Damages.* As time is an essential element of the contract, all work shall be completed within the contract period. For each calendar day that any work remains uncompleted after the end of the contract period, the amount of Seventy Five Dollars ($75.00) per calendar day will be assessed, not as a penalty, but as a predetermined and agreed amount to be used to pay, in part, any additional engineering expenses incurred by the Owner after the end of the contract period."

At the trial evidence was adduced by defendant to show that: Because of the delay the defendant incurred additional engineering expenses of $1,137.16; it incurred in unascertainable amounts additional expense in moving bleachers which would have been avoided had the work been completed in time so that the movement could have been made with regular employees; it was unable to use for a period of time some associated athletic facilities; there was expense and inconvenience in protecting the work while it cured which would have been avoided; and there were other items of inconvenience to the school and public to which no monetary valuation could be affixed. The total contract price was $80,896.98.

This court has had occasion previously to consider the question as to whether a liquidated damage provision similar to that here is valid. In Parsons Constr. Co. v. Metropolitan Utilities Dist., 170 Neb. 709, 104 N. W. 2d 272, the court had before it such a provision calling for liquidated damages of $150 per day. We there said: "In the case of Stanford Motor Co. v. Westman, 151 Neb.

850, 39 N. W. 2d 841, this court held: 'As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.' The court cited 15 Am. Jur., Damages, § 246, p. 678, as follows: 'In such cases the court must find out whether the payment stipulated is in truth liquidated damages or a penalty. The question whether it is the one or the other is a question of law and one quite independent of the agreement of the parties to call it the one or the other.' The court further said: 'We said in Gustin & Co. v. Nebraska Building & Investment Co., 110 Neb. 241, 193 N. W. 269: ". . . where the damages are uncertain, and not readily capable of exact ascertainment by any known rule, and the parties surveyed the whole situation at the time of contract, and agreed upon the amount of damages, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recovery and is liquidated damages and not a penalty." ' The court further held: 'If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.' See, also, Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176; Edgar v. Anthes, 109 Neb. 546, 191 N. W. 682."

At 5 Williston on Contracts (3d Ed.), § 785, p. 733, we find the following: "It is commonly provided in building and construction contracts that there shall be deducted from the contractor's compensation a fixed sum for each day's delay in performing the contract beyond the day fixed therein. Such damages are obviously graded according to the extent of the breach, increasing proportionately with each day's delay. Moreover, each day's delay, while unquestionably injurious, is in-

jurious frequently in ways that are difficult to estimate. Accordingly, unless the sum fixed in the contract is very unreasonable the provision is treated as one for liquidated damages." See, also, 5 Corbin on Contracts, § 1072, p. 402. We hold that the trial court's determination that the contract provision for liquidated damages was not penal is correct.

We next turn to the question whether the delay in performance was excusable under the terms of the contract and whether there was a jury question on any point related to this issue other than the contract completion date. The contract provides: "59. . . . The Contractor expressly covenants and agrees that in undertaking to complete the work within the contract period fixed in the contract documents, he has taken into consideration and made allowances for all delays and hindrances incidental to such work, whether growing out of delays in securing materials or workmen, or otherwise. *Should the Contractor be delayed* in the prosecution and completion of the work *by any cause beyond his control*, he shall have no claim or right of action for damages from the Owner for any such cause or delay, unless the cause or delay is the result of fraud or active interference by the Owner. The Contractor will in such case be granted an extension of the time specified for completion of the work as the Owner may award in writing on account of such delay, provided however, that claim for such extension of time is made by the Contractor to the Owner, through the Engineer, in writing, within two weeks from the time when any such alleged cause for delay shall occur. The Owner, through the Engineer, reserves the right to withhold granting of any time extensions until the stipulated contract period is about to expire.

"The Owner at the Owner's sole discretion may waive the above requirements and grant extensions of time for any reason or reasons the Owner deems valid. Time extensions, however, will not be granted for rain, wind,

flood or other natural phenomenon of normal intensity for the locality where work is performed.

"An extension of the contract period may be granted by the Owner for any of the following reasons: . . . b. Delays caused by the Owner . . .." (Emphasis supplied.)

Contract specification GC (general condition) 58 grants the owner the right to withhold liquidated damages from payment, contains other provisions re liquidated damages, and then provides: "Extensions of time granted by the Owner in accordance with the provisions of 'Extensions of the Contract Period' *shall not operate to the contrary, unless such extensions granted by the Owner specifically provide for the waiving of liquidated damages* during and over such period of time extension." (Emphasis supplied.) GC-68: "During freezing weather or weather which would be unsuitable for the proper execution of the work in a first-class manner, all work must be stopped and properly protected from possible injury."

We note first the claim that because of abnormal rainfall during the period May 27, 1967, to July 3, 1967, plaintiff was prevented from proceeding with the work. Competent evidence received by the court would support such a conclusion. The plaintiff argues that because of the provisions of GC-68 above it was not required to make a written request for extension under GC-59. We do not so construe the contract. GC-59 by its terms refers to and contemplates delays caused by unusual weather conditions. GC-68 refers to protecting the work from any weather conditions, normal or abnormal, which would be harmful to it. A contractual requirement that requests for "contract period" extensions must be in writing has been upheld by this court as binding. Parsons Constr. Co. v. Metropolitan Utilities Dist., *supra;* Olson Constr. Co. v. Commercial Building & Inv. Co., 127 Neb. 609, 256 N. W. 22; Carter v. Root, Inc., 84 Neb. 723, 121 N. W. 952.

We next turn to an examination of the two defenses

of excusability labeled (b) and (c) in the second paragraph of this opinion. Assuming the testing laboratory and the manufacturer's representative were parties for whose action or inaction the defendant was responsible and that this would constitute a legal excuse the evidence does not show the alleged inaction of the two parties caused the delays in the performance of the contract. All the evidence shows is the testing laboratory furnished the required formulas on the dates alleged and the manufacturer's representative was not present until July 24, 1967. There is no evidence whatever to show the plaintiff was ready to make use of the mixing formulas before it received them or that it could or would have completed the contract in time had they been furnished earlier. Neither is there any evidence that the laboratory would not have furnished the information earlier had plaintiff made request therefor. The record as a matter of fact clearly supports contrary inferences. The contract provision GS-7-1 states in part: "The Contractor shall submit samples of all materials to be used in the rubber asphalt mix to a testing laboratory designated by the Owner." There is no evidence to show when the samples were furnished. The record does show the plaintiff did not order the rubber needed for the construction until May 19, 1967. Receipt of the order was confirmed May 24, 1967. There is no showing as to when the shipment arrived. The record does show that the plaintiff was not ready to lay the resilient course until July 22, 1967, 22 days after the expiration of the "contract period."

As to the presence of the manufacturer's representative the record shows that he was delayed 2 days beyond the date agreed upon with the contractor. The construction contract contains no provision requiring the presence of the manufacturer's representative. This was a matter insisted upon by the plaintiff and the manufacturer. The defendant was in no way responsible in this connection.

For the reasons just set forth we are not called upon to decide the plaintiff's contention that where the owner is responsible for the delay the contract provisions requiring written requests for extensions and the liquidated damages provision do not apply. It relies upon Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist., 59 Cal. 2d 241, 28 Cal. Rptr. 714, 379 P. 2d 18. Even if the contrary decisions of this court, viz., Olson Constr. Co. v. Commercial Building & Inv. Co., *supra,* needs reexamination, as plaintiff contends, this is not a case in which we can do it.

We have carefully examined the record relative to the contention of estoppel claimed to have arisen because of the alleged statement of Charles Kemery. The plaintiff's president, Costin, testified to a conversation as follows: "A. I said, 'I am concerned with the passing of the calendar days and I would like to request an extension of time.' And he answered, 'Jim, you are unduly concerned, we will handle this as we always do when the job is complete.' Q. And did he tell you who would handle it or how it would be handled? A. He said, 'Our company will handle this when the job is complete.' " Costin further testified to his conclusionary view that Kemery was the engineer in charge for the corporate engineer. He testified to the functions which he observed Kemery perform. There is testimony of the corporate engineer's representative which classified Kemery only as an inspector. Be that as it may the contract itself defines the authority of the engineer and the inspector. Neither definition of authority includes the authority to waive general conditions of the contract. Such authority as the engineer may have in this respect seems confined to plans and specifications. There is in the record no evidence of any act, or failure to act, by the defendant which could give rise to an apparent authority on the part of Kemery to waive the contractual requirement that requests for extensions of the "contract period" and the granting of such requests must

be in writing. At this point it is pertinent to call attention to the provision of GC-58 already noted that the granting of extensions of time does not release the provision on liquidated damages "unless such extensions granted by the Owner specifically provide for the waiving of liquidated damages during and over such period of time extension."

"Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. The principal is only liable for appearance of authority caused by himself. Ostensible and apparent agency have been treated in this jurisdiction as being synonymous. In Farmers Cooperative Shipping Assn. v. Adams Grain Co., 84 Neb. 752, 122 N. W. 55, this court said: 'It is well established that the authority of an agent cannot be established by his own acts and declarations. . . . Consequently, when we speak of the apparent authority of an agent as binding his principal, we mean such authority as the acts or declarations of the principal give the agent the appearance of possessing. Closely related to this doctrine of apparent authority, and really a part of it, is the doctrine of estoppel under which a party who has knowingly permitted others to treat one as his agent will be estopped to deny the agency.'

"Maryland Casualty Co. v. Moon, 231 Mich. 56, 203 N. W. 885, states: 'The apparent authority for which the principal may be liable must, however, be traceable to him and cannot be established by the acts and conduct of the agent. The principal is only liable for that appearance of authority caused by himself.' " Rodine v. Iowa Home Mutual Cas. Co., 171 Neb. 263, 106 N. W. 2d 391. See, also, Restatement, Agency 2d, § 27, p. 103.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

JOHN W. SINNETT, APPELLANT, V. RONALD M. ALBERT ET AL., APPELLEES.

195 N. W. 2d 506

Filed March 17, 1972. No. 38079.

1. **Libel and Slander: Trial: Privileged Communications.** Absolute privilege attaches to defamatory statements made incident to, and in the course of, a judicial proceeding if the defamatory matter has some relation to the proceedings.
2. ———: ———: ———. The rule of absolute privilege is applicable not only to judicial proceedings but to quasi-judicial proceedings as well.
3. **Libel and Slander: Trial.** The relevancy of the defamatory matter is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action.
4. **Libel and Slander: Trial: Privileged Communications: Attorneys at Law.** There is an absolute privilege to publish false and defamatory matter in a complaint made to the committee on inquiry of the Nebraska State Bar Association regarding the alleged misconduct of an attorney where the defamatory matter has some relation thereto.
5. **Attorneys at Law: Trial: Witnesses.** It is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Claude D. Shokes and Douglas McArthur, for appellant.

William H. Mecham and Carl L. Klekers, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is an action by plaintiff, John W. Sinnett, against defendants, Ronald M. Albert and Hie Food Products, Inc., for damages for libel. At the close of the plaintiff's case, the district court sustained defendants' motion for a directed verdict and dismissed the plaintiff's petition. The critical issue on appeal involves the nature

and extent of "privilege" where the alleged defamation of the plaintiff occurred in connection with proceedings to disbar or discipline an attorney who is not the plaintiff.

It should be noted that in Nebraska, proceedings before a committee on inquiry must be had prior to instituting the judicial procedure for discipline of attorneys. Unless requested by the attorney charged, neither the hearing, records, or proceedings of the committee on inquiry shall be made public nor any publicity be given thereto prior to the filing of a complaint against the attorney in this court. See, Rules Creating, Controlling and Regulating the Nebraska State Bar Association, Article XI, paragraphs 10 and 11; and Revised Rules of the Supreme Court of Nebraska, Disciplinary Proceedings, paragraphs 10 and 11, p. 32 (November 15, 1971).

The defamatory statement here was a part of a complaint lodged by the individual defendant with a committee on inquiry of the Nebraska State Bar Association against an attorney. The complaint involved the attorney's conduct in connection with a previous lawsuit between the parties involved here. Although the allegedly defamatory statement was never admitted into evidence, it may be inferred that it was an incidental or explanatory part of the complaint against the attorney. The members of the committe on inquiry properly refused to testify as to any of the records or proceedings before the committee.

Although the plaintiff asserts various errors in connection with the exclusion of evidence, we do not reach those matters in view of our determination on the basic issue of privilege.

"The absolute privilege to publish defamatory matter under the circumstances to which the privilege applies is based upon the ground that 'there are certain relations of life in which it is so important that the persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and in order

that their duties may be carried on freely and without fear of any action being brought against them, it says: "We will treat as absolutely privileged any statement made in the performance of these duties." ' " Ramstead v. Morgan, 219 Ore. 383, 347 P. 2d 594 (1959). See, also, Restatement, Torts, Introductory Note, Chapter 25, Title B, p. 223.

The absolute privilege attaches to defamatory statements made incident to, and in the course of, a judicial proceeding if the defamatory matter has some relation to the proceedings. Restatement, Torts, §§ 586, 587, and 588, pp. 229 to 234; Annotation, 77 A. L. R. 2d 493.

The rule of absolute privilege is applicable not only to judicial proceedings but to quasi-judicial proceedings as well. Shumway v. Warrick, 108 Neb. 652, 189 N. W. 301. As to judicial proceedings, it is not necessary that the defamatory matter be relevant or pertinent to any issue before the court. It is necessary only that it have some relevance to the judicial function which is being performed. See Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686. Even in a quasi-judicial proceeding, the relevancy of the defamatory matter is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action. Fenning v. S. G. Holding Corp., 47 N. J. Super. 110, 135 A. 2d 346; Shumway v. Warrick, *supra*.

Proceedings for the discipline or disbarment of attorneys have been regarded as judicial in character. On the issue of privilege in connection with complaints or institution of proceedings to discipline or disbar attorneys, the case of Ramstead v. Morgan, 219 Ore. 383, 347 P. 2d 594 (1959), is a leading case. After an extensive review of the authorities involved, the court noted that if the defendant's letter of complaint had set in motion the bar's trial procedure and he had been called before the trial committee to testify as a witness, the quasi-judicial character of the proceeding would warrant the application of the rule of absolute privilege. The

court then said: "Considering the purpose of the rule, we think that relevant statements made in a complaint designed to initiate such quasi-judicial action should also be protected. * * * Our conclusion rests upon the basic premise that disciplinary proceedings are carried on as one of the processes of this court. It makes no difference whether the process is denominated judicial or quasi-judicial; it is an integral part of the functioning of the judicial branch of government and the process includes the filing of an informal complaint by one who wishes to charge an attorney with unprofessional conduct."

We think it deserves comment that all of the proceedings before the committee on inquiry were completely protected from public disclosure while any judicial proceeding which might have followed would no longer be private. It is unquestioned that there is an absolute privilege to publish false and defamatory matter in judicial proceedings, where the matter has some relation to the proceeding. We therefore hold that the same rule of absolute privilege attaches to defamatory statements contained in a complaint made to the committee on inquiry of the Nebraska State Bar Association regarding the alleged misconduct of an attorney. The rule applies whether or not the complaint resulted in later formal hearings.

People have a right to complain about professional misconduct of an attorney to the properly constituted authorities. The exercise of that right should not be discouraged by fear on the part of the complainant that he may have to defend a lawsuit for defamation by anyone who deems himself defamed by relevant statements made in the complaint. Reasonable demands of sound public policy require the imposition of absolute privilege. Where the defamatory matter has some relation to the proceeding, that shield of immunity defends the complainant not only from the attorney complained

against but against any other person who might have been defamed.

One other issue must be covered. The plaintiff's original attorney in this action was required to withdraw as counsel immediately following the voir dire when the court became aware that the counsel was expecting to be a witness. Plaintiff complains that this was improper because it may have worked a substantial hardship. It is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein. Muse v. Stewart, 173 Neb. 520, 113 N. W. 2d 644; American Bar Association Code of Professional Responsibility, Dr 5-101. Even an inexperienced lawyer must be charged with knowledge of so basic a rule of professional conduct.

The judgment of the district court is affirmed.

AFFIRMED.

EDWARD VACEK ET AL., APPELLEES, V. EUGENE MARBURGER, APPELLANT.
195 N. W. 2d 515

Filed March 17, 1972. No. 38089.

1. **Actions: Parties: Trial.** A defendant in the Nebraska Penal and Correctional Complex is under no disability barring the prosecution of an action in the courts of this state by reason of his imprisonment.
2. **Actions: Parties: Pleadings: Words and Phrases.** The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys and the mere neglect of either will not enable a party to relief on that ground.

Appeal from the district court for Clay County: S. S. SIDNER, Judge. Affirmed.

Duane L. Nelson, for appellant.

John E. Sullivan and John J. Sullivan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This was an action by Edward Vacek, Harry Vacek, and James Vacek, appellees, to cancel a lease of farm land to Eugene Marburger, appellant; to have growing crops harvested at appellant's expense; to remove appellant's property from the premises; to restrain appellant from entering upon the premises; and for damages. The case was tried on the general issues raised by the petition in a default proceeding. The court granted the relief requested, and ordered appellees to pay $300 into court for the benefit of appellant. We affirm.

At all stages of the proceeding herein the appellant was in custody on criminal charges. At the outset of the litigation in September 1970, he was in the Clay County jail. At that time he was represented herein by the counsel who was defending him on the criminal complaint on which he was being held. This counsel filed an answer and cross-petition for him. On October 2, 1970, appellant was transferred to the Nebraska Penal and Correctional Complex where he was confined at the time judgment was entered against him. The case was originally set for trial December 11, 1970. On or about December 1, 1970, when appellant learned that the case was set for trial in spite of his confinement, he decided that his counsel was not representing his interests and terminated the attorney-client relationship. The appellant then requested his wife, who lived in the county in which this action was pending, to secure counsel for him. She was unable to do so.

Appellant believed that one of the appellees, who knew he was incarcerated, would not take final action until he had an opportunity to employ counsel or was released from custody. He was also of the belief that James Vacek, the appellee who made the lease with him, was out of the country and unavailable for trial. James

Vacek actually appeared at the trial. Appellant was notified December 22, 1970, that the case would be tried on January 14, 1971. He was unable to obtain counsel and relied on his belief that no action would be taken.

Appellant admits he received notice of the trial date. Trial was held on that date, with no appearance by the appellant's wife or any attorney representing his interests. Appellant filed a motion for new trial on February 1, 1971, or 17 days after judgment was rendered, premised on the theory that he had unavoidably been prevented from securing counsel by reason of his incarceration. This motion was overruled. On this appeal appellant contends it was an abuse of discretion on the part of the trial court to deny his motion for a new trial where a judgment had been entered in the absence of appellant or his representative because appellant was incarcerated on a criminal charge, and as a result thereof was unable to prepare for trial.

Section 25-1143, R. R. S. 1943, provides: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, except (1) where unavoidably prevented, or (2) for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

Appellant's motion for new trial was not filed within the time required unless he was unavoidably prevented by virtue of his confinement in the Nebraska Penal and Correctional Complex, which is the same issue on which he premises his right to a new trial.

Was appellant unavoidably prevented from contesting the present action by reason of his confinement in the Nebraska Penal and Correctional Complex? The answer is in the negative. In Kock v. State (1905), 73 Neb. 354, 102 N. W. 768, the defendant, in an attempt to justify his failure to institute proceedings in error within the

required time, contended that he was one of the class of persons mentioned in the statute as being under a disability. He insisted that because he was taken to the Penitentiary and imprisoned therein in compliance with the judgment of the court, the time limitation therein did not apply to him. This court stated: "The mere statement of this proposition is its own refutation. If this contention should be held good, the defendant could serve out his full six years of imprisonment and still have one year thereafter in which to prosecute his petition in error. The fact is that he is under no disability by reason of his imprisonment; * * *."

See, also, Stanosheck v. State (1959), 168 Neb. 43, 95 N. W. 2d 197, in which we said: "The provisions of section 29-2103, R. R. S. 1943 (new trial in criminal proceedings), are mandatory and a motion for new trial in a criminal action must be filed within 10 days after the verdict or judgment is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days.

"The words 'unavoidably prevented' as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground."

This has been the interpretation given to those words since the early case of Roggencamp v. Dobbs (1884), 15 Neb. 620, 20 N. W. 100, where this court said: "The words 'unavoidably prevented' evidently refer to circumstances beyond the control of the party desiring to file the motion. The law requires diligence on the part of clients and attorneys, and the mere neglect of either will not entitle a party to relief on that ground." We determine that confinement in a penal institution does not

unavoidably prevent a party from making a defense to an action against him.

In the instant case the appellant had counsel whom he discharged. He had been in contact with his wife who he expected to secure counsel for him. The fact that he guessed wrong on the presence of James Vacek at the trial, or as to whether or not a trial could be had in his absence, does not come within the ambit of "unavoidably prevented" as used in our law.

The judgment of the trial court is affirmed.

AFFIRMED.

A. C. NELSEN ENTERPRISES, INC., A CORPORATION, APPELLANT, V. R. H. DOC COOK ET AL., APPELLEES.
195 N. W. 2d 759

Filed March 17, 1972. No. 38110.

Zoning: Equity. Where a certificate of occupancy has been properly obtained in accordance with zoning statutes and ordinances, it may not be arbitrarily revoked where the certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon the certificate.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Edward Shafton and Bernard E. Vinardi, for appellant.

Herbert M. Fitle and Allen L. Morrow, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The district court for Douglas County, Nebraska, dismissed plaintiff's petition and appeal challenging a decision of the Board of Appeals of the City of Omaha which revoked a certificate of occupancy issued to the plaintiff.

On February 4, 1969, the plaintiff, A. C. Nelsen Enterprises, Inc., applied to the City of Omaha for a certificate of occupancy to use the premises at 13117 West Dodge Road for the retail sale of mobile homes and allied equipment. That location is outside the City of Omaha but within the 3-mile area of its zoning jurisdiction. The chief building inspector of the City of Omaha ordered that a certificate of occupancy be issued. It was issued to the plaintiff on February 4, 1969. The certificate recited that the property had been inspected and found suitable for occupancy and use for retail sales of mobile homes and allied equipment and that the proposed use complied with all regulations and ordinances in force relating to such occupancy and use. The certificate showed that the property was zoned as C-1, first commercial.

On February 12, 1969, the plaintiff leased the premises from the owner for a 3-year term at a rental of $500 per month, a total of $18,000. Thereafter, the plaintiff expended approximately $12,000 in preparing the premises for use as a mobile home sales lot. Plaintiff also committed itself for an advertising campaign and obligated substantial sums for acquisition of inventory.

On May 5, 1969, plaintiff was notified by the superintendent of the permits and inspection division, over whose name the certificate of occupancy had been issued, that the certificate had been issued in error and was therefore void. Plaintiff was notified to remove its mobile home sales business from the property within 15 days. On May 8, 1969, plaintiff was advised that the "error" was that first commercial zoning did not allow trailer or mobile home sales and that mobile home sales was not a proper use in that zone. The plaintiff duly lodged his appeal with the Board of Appeals and it was denied on June 9, 1969. Appeal was then duly perfected to the district court and thereafter to this court.

The zoning code of the City of Omaha describes the

first commercial (C-1) district as being primarily to provide neighborhood retail shopping facilities and personal service facilities. Approximately 70 specified commercial uses are permitted in C-1. They include auto sales and service, including open-air displays of new and used cars; auto accessory stores; auto laundries; department stores; gasoline filling stations; garden supply stores, including open-air displays of trees, shrubs and flowers; marine equipment and service stores, including open-air displays of boats; hotels and motels; boarding and lodging houses; and restaurants and theaters, including drive-in establishments. The evidence reflects that the building inspector for a number of years had interpreted the zoning provisions to permit retail sales of trailers in the first commercial zone.

The City contends that retail sales of mobile homes or trailers are limited to the sixth and second commercial districts. The C-6 district is established primarily for automobile oriented businesses, together with other traditional open-air types of retail establishments. All but 2 of the 18 specified uses are also included in the 70 permitted uses in C-1. Trailer sales and rentals constitute one of those two uses. The C-2, second commercial district, permits any commercial use except specified excluded uses. Retail sales of mobile homes or trailers is not excluded.

The City contends that when a ministerial officer issuing a certificate of occupancy does so under a mistake of fact or in contravention of applicable zoning laws, the recipient of the certificate acquires no vested rights and the City is not estopped from revoking such a permit. That is not the situation here.

In this case, there was no mistake of fact. It is seriously questionable that there was even a mistake of law. The certificate of occupancy was lawfully issued by the municipal officer having authority to issue it and in accordance with the departmental interpretation of the

zoning laws which had been in effect for some years. There is no evidence of misconduct, fraud, or deceit of any kind and, in addition, there was substantial good faith expenditure of funds and change of position in reliance upon the certificate issued.

Where a certificate of occupancy or building permit has been issued lawfully, even though in accordance with a questionable interpretation of the zoning ordinances or regulations, courts have generally held that it may not arbitrarily be revoked, particularly where the permittee has incurred substantial expenses and liabilities in reliance upon it. See 8 McQuillin (3d Ed.), Municipal Corporations, § 25.158, pp. 506, 507.

In Parker-Quaker Corp. v. Young, 23 Conn. Supp. 461, 184 A. 2d 553 (1962), the court held that a substantial change in position by the permittee after issuance of the permit and before its revocation was sufficient to create a vested right to proceed and that the City acted illegally in ordering permits revoked. The court said: "* * * the general rule is that any substantial change of position is sufficient. There is no easy formula to resolve issues of this kind. The ultimate objective is fairness to both the public and the individual property owner. * * * The factual situation must be dealt with separately."

In Crow v. Board of Adjustment of Iowa City, 227 Iowa 324, 288 N. W. 145, a building permit issued by the building inspector for a dog hospital in an area zoned for hospitals was involved. In that case, the Board of Adjustment attempted to revoke a building permit after substantial expense had been incurred by the permit holder. The court said: "A building permit duly and legally issued by a municipality is more than a mere license revocable at the will of the licensor. We have held that when the permittee has to some extent acted thereon and thereby incurred expense such permit is not revocable on the grounds that the proposed building and business would be objectionable to residents of the

neighborhood. * * * The ruling of the building inspector was not clearly erroneous nor without basis. On the contrary the proposition was doubtful and fairly debatable and the language fairly susceptible to the interpretation given it."

The facts here involve a certificate of occupancy issued to a lessee rather than a building permit issued to an owner. The prinpicles dealing with arbitrary revocation, substantial reliance, and vested rights are equally applicable to both. Even if it be assumed that the zoning ordinance did not expressly permit retail sales of mobile homes in a C-1 zone, the practical difficulties and hardships to the lessee certificate holder should require relief under section 14-411, R. R. S. 1943.

The City contends that there has been no showing that the property cannot be used for some other fully conforming purpose, but that position treats the plaintiff as an owner rather than the tenant it is. Its business is presumably the business for which it obtained the certificate of occupancy. It is wholly unrealistic to ignore the rights of the holder of a certificate of occupancy simply because the holder of the certificate is not the owner of the property. There is evidence that plaintiff holds lease options to February 28, 1974, and that its obligations and commitments were incurred in contemplation of a 5-year period ending on that date.

We therefore hold that where a certificate of occupancy has been properly obtained in accordance with zoning statutes and ordinances, it may not be arbitrarily revoked where the certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon the certificate. Each case must be determined on its own facts, with the ultimate objective of fairness to both the public and the individual certificate holder. Such a rule protects the interests of a permittee who has acted under a permit in good faith but withholds protection on permits where good faith

does not appear. It thus protects the public interest in an effective regulation of land uses. See Shalvey v. Zoning Board of Review, 99 R. I. 692, 210 A. 2d 589 (1965).

The facts here clearly establish a balance of the equities in favor of the plaintiff as against the general public represented by the municipal authorities. The Board of Appeals and the City of Omaha should be restrained from revoking the certificate of occupancy here during the effective period of plaintiff's lease or valid extensions thereof. The judgment is reversed and the cause remanded to the district court for further proceedings in accordance with this opinon.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WILLARD MAAS, APPELLEE, V. A. W. SCOBODA, DOING BUSINESS AS NORFOLK FARM EQUIPMENT COMPANY, APPELLANT.
195 N. W. 2d 491

Filed March 17, 1972. No. 38112.

1. **Contracts: Sales: Property: Vendor and Purchaser.** Under section 2-601 of the Uniform Commercial Code a buyer is given a right to reject the whole if the goods fail in any respect to conform to the contract.
2. **Contracts: Waiver: Property: Vendor and Purchaser.** After rescission any use of the property by the buyer for his own benefit or convenience will waive the right to rescind.
3. **Contracts: Trial: Property: Vendor and Purchaser.** Under the provisions of a contract for the purchase of a silo with a 1-year warranty of customer satisfaction, the buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts is a question of fact for the jury.
4. **Contracts: Property: Vendor and Purchaser.** The law regards parties as being competent to contract as they see fit with respect to the satisfactory character of equipment sold, and the seller assumes the hazard of rendering performance according to the terms of the contract.

Appeal from the district court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Deutsch & Hagen and Thomas H. DeLay, for appellant.

Hutton, Hutton & Garden, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an action by Willard Maas, appellee, to rescind or revoke the purchase of a high moisture silo and equipment, for the reason that the appellant, A. W. Scoboda, doing business as Norfolk Farm Equipment Company, was unable to make the silo operate to the satisfaction of appellee. The trial court granted rescission. We affirm.

Appellee operates a farm in Wayne county. During the summer of 1966, he became interested in a "Fiber-Tron Crop Savor," a high moisture grain storage silo, for his farm. He visited with the appellant about the equipment and was shown a silo in operation. He entered into a contract with the appellant, conditioned upon a 1-year warranty of satisfaction. The contract, so far as material herein, is for a "Fiber-Tron Crop Savor" sweep arm auger unloader and motors for a cash sale price of $5,157. The appellee was to furnish the Ready-Mixed concrete and the sand for the foundation and provide for the wiring for the motors. The contract had the following provision: "one year warranty of customer satisfaction," which was inserted as an inducement to purchase. The contract is dated September 15, 1966.

After the silo was constructed in October of 1966, appellee filled it with 9,000 bushels of corn from his fields. He had the corn tested on three different occasions and the moisture content ranged from 22 percent to 24½ percent. He had been instructed not to fill the silo with corn with a moisture content of over 28 percent or under 20 percent. Representatives of the appellant were present

at the time the silo was filled. Sometime in February 1967, appellee opened the silo to remove corn for livestock feed. In attempting to remove corn, he encountered several problems. To put appellee's difficulties in perspective, we summarize them from his testimony. The motor blew approximately 70 fuses between February and August. When the fuses on the motor blew, appellee was required to drain the corn from the augers and to replace the fuses in order to start the motor. This was done by hand. The horizontal interior building auger clogged on occasions. The silo required a daily water drainage of 5 to 10 gallons. The outside vertical auger could deliver only a portion of the corn so the corn load had to be split by having the cleanout opened, and half the corn shoveled by hand. The interior upper sweep arm broke twice, and a new one had to be installed. The interior upper sweep arm motor control box, which was wired at the factory, broke, and appellee was required to spend 2 days removing corn from the portion of the silo to permit an electrician to gain access to repair the broken wire. This was done at appellee's own expense because appellant refused to do it on the assumption that the defect was in the wiring installed by the appellee's electrician, which was not the case. The upper sweep arm failed to dig into the corn from the top, requiring the appellee or his employees to climb inside the silo and remove 3,000 bushels of corn by hand. As a result of the defects in the silo, several hundred bushels of corn completely spoiled, approximately 2 or 3 hundred bushels of which were in the silo at the time of this action.

The appellee complained to the appellant when he began experiencing difficulties, but continued to use the equipment in an attempt to obtain satisfactory operation. Appellant testified he knew appellee was experiencing problems with blowing fuses, the upper sweep auger, with moisture in the corn, and with the wiring.

Appellant also admitted that 11 other such silos sold by him had unsatisfactory upper sweep augers. Sometime in August of 1967, appellee verbally advised the appellant that he was dissatisfied with the equipment and requested return of the purchase price. On August 17, 1967, appellee, through his attorney, gave notice to the appellant that he was dissatisfied with the equipment, was invoking his right to insist upon the 1-year warranty of customer satisfaction, and was requesting appellant to forthwith remove the structure from his premises and repay the money he had paid for the equipment.

Appellant sets out five assignments of error but in his brief argues but one of them: That the appellee, after giving notice of rescission or revocation of acceptance for breach of warranty, waived his right to rescind and revoke by subsequently exercising dominion over the silo. Appellant premises his position on the following cross-examination testimony: "Q After you turned them down on the five horse motor you turned them down on the double sweep arm installation, you then had your lawyer write this letter, Exhibit 2, didn't you? A Yes. Q And you continued to use this equipment after that time? A Yes * * * Q (By Mr. Deutsch) To summarize on that point you continued to use it until the 13th of September but you still had some of your product in that bin do you not to this day? A That spoiled corn, yes. Q You never cleaned it out? A No, I did not. Q How many bushels have you got in there now? A Between two and three hundred bushel."

At the time appellee demanded the removal of the silo from his premises, there may have been as much as 3,000 bushels of spoiled or spoiling corn in the silo. By September 13, 1970, 2 days before the warranty would expire, appellee had removed all but the 2 or 3 hundred bushels of spoiled corn which still remained in the structure at the time of trial.

This is not an action to recover damages for breach

of warranty but rather is one to rescind or revoke the sale of the silo and recover back the purchase price as well as the installation expense incurred under the contract. Under section 2-601 of the Uniform Commercial Code a buyer is given a right to reject the whole if the goods fail in any respect to conform to the contract. In rescission, the law implies the revesting of the property in the seller and requires the repayment of the purchase price to the buyer.

The remedy available was under the controlling terms of the specific contract: "one year warranty of customer satisfaction." This is referred to as a satisfaction clause which is the subject of an Annotation at 86 A. L. R. 2d at p. 203, from which we quote the following: "In cases involving contracts for the sale of goods subject to their being satisfactory to the buyer, there are two general rules regarding the test of the buyer's satisfaction: (1) the rule that the test of the buyer's satisfaction is his own personal judgment, to which a majority of courts add the qualification that the buyer's personal judgment must be exercised in good faith; and (2) the reasonable man rule that the buyer is legally bound to be satisfied with the goods if a reasonable man would be satisfied with them."

It is appellant's position that when appellee gave notice of rescission, it was his responsibility to place the appellant in status quo as far as possible, and to thereafter hold the silo as a bailee, and that his subsequent use or exercise of dominion over it was a waiver of the right of rescission. The general rule may be summarized as follows: After rescission any use of the property by the buyer for his own benefit or convenience will waive the right to rescind. See Annotation, 41 A. L. R. 2d 1173. That rule, however, is not applicable to the facts herein.

Section 2-602 of the Uniform Commercial Code, requires a buyer's rejection to be made within a reasonable

time. This provision is not applicable herein because appellee by contract had 1 year to determine if the silo would be satisfactory for his purposes. In this state he would be expected to make a good faith attempt to adapt it to those purposes. We determine the following rule to be applicable herein: Under the provisions of a contract for the purchase of a silo with a 1-year warranty of customer satisfaction the buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts is a question of fact for the jury. Adapted from Melson v. Turner, 125 Neb. 603, 251 N. W. 172.

The law regards parties as being competent to contract as they see fit with respect to the satisfactory character of equipment sold and the seller assumes the hazard of rendering performance according to the terms of the contract.

The record indicates appellee made a diligent effort to obtain satisfactory performance from the equipment, and gave the appellant sufficient opportunity to make it perform satisfactorily. Appellant declined to do anything about the defective wiring. There was breaking of the upper sweep arm shaft, welding, replacement, constant failure of the augers to work, and wet corn in a silo supposedly designed to prevent excessive moisture. At the time of rescission, appellee had 3,000 bushels of corn still in the silo. From February to the date of rescission, appellee experienced considerable difficulty removing 6,000 of the 9,000 bushels he had put in the silo the preceding fall. On the record, no reasonable man could say that appellee had not given the equipment a fair trial. Appellee's rescission was based on reasonable grounds. The trial court properly found that the dissatisfaction expressed by appellee was an honest and a good faith judgment.

The only use of the silo after rescission was to remove the balance of the corn which, except for 2 or 3 hundred

bushels of spoiled corn, was accomplished within the warranty period. This is not a use of the equipment but rather necessary preparation for its removal by the appellant. Appellee, at the time of the rescission, requested the appellant to remove the equipment from appellee's premises. Appellant failed to do so, and contested appellee's right to rescind. The silo was set up by bolting sections together, and it undoubtedly will be removed in the same manner. If appellant had recognized appellee's right to rescind and had taken steps to remove the silo, the 3,000 bushels of corn could have been much more expeditiously removed from it. Under the facts of this case, the law of De Minimis Non Curat Lex is applicable to the small quantity of spoiled corn which remained in the silo after the expiration of the year. We do not consider this to be a sufficient use of the silo within the rule to waive the right of rescission.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN REED, JR., APPELLANT.
195 N. W. 2d 503

Filed March 17, 1972. No. 38242.

1. **Criminal Law: Witnesses: Evidence: Trial.** A conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if the pretrial identification procedures were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
2. **Criminal Law: Right to Counsel.** In a criminal prosecution the right of an indigent to the assistance of counsel does not encompass an unbridled right to choose his counsel.
3. ———: ———. When a competent indigent becomes dissatisfied with court appointed counsel but shows no good cause for removal of counsel, his only alternatives are to proceed with appointed counsel or to proceed pro se.
4. ———: ———. When unjustified obstreperous conduct of a

competent defendant prevents the services of appointed counsel, the accused cannot complain of lack of the services of counsel caused by such conduct.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Marer & Lazer and Michael L. Lazer, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant was convicted by a jury on the charge of carrying a concealed weapon, a revolver or pistol, and was sentenced to a term of 2 years. On this appeal three claims are made: (1) The trial court erred in not suppressing the eyewitness identification testimony of certain witnesses because their in-court identifications were not independent of and were tainted by unduly suggestive photographic and lineup identifications; (2) the evidence is insufficient to support the verdict because it did not establish that the defendant "concealed on or about his person a certain revolver or pistol" which was a "dangerous weapon"; and (3) the defendant was deprived of his right to counsel at the time of sentencing, thus being unconstitutionally deprived of counsel at a critical stage of the proceeding.

We find the assignments are not well taken and affirm the conviction and sentence.

The trial court held a Wade-Gilbert-Stoval hearing prior to trial and at the conclusion thereof found the in-court identification had not been tainted by pretrial occurrences and was admissible. The complaints concerning pretrial identification are these: (1) Before lineup a police officer called one of the witnesses and told him he "had the fellow and . . . wanted them to come and

view him for identification"; (2) the defendant appeared alone at the pretrial identification; and (3) one of the witnesses had before the identification by chance seen a photograph of the defendant on a police officer's desk.

The record of the hearing and of course the trial itself are before us. From the evidence presented the court and jury could have found as follows: On the day of the offense a black man wearing a beard and mustache was observed by witnesses, employees of a grocery store where the incident occurred, concealing three cartons of cigarettes in his clothing. He was accosted by the witnesses and asked to come to the rear of the store and as he was apparently complying with the request he removed the cartons from his clothes and disposed of them in a grocery cart. After this he pulled from his clothing a pistol or revolver. A struggle ensued and the gun discharged apparently while pointed upward. The man then broke loose and ran from the store. As he did so he passed by an acquaintance who had previously worked with him. This acquaintance, a witness in the case, had also seen him during the struggle and immediately before it. This witness also observed the gun at the man's side as he ran from the store. The acquaintance immediately identified the man to the store employees. Later the same day the witness identified the defendant by photograph and as a result the defendant was taken into custody the next day since as a result of the identification by the acquaintance the police knew by name for whom they were looking. At the trial the acquaintance identified the defendant in court. On the afternoon of the incident the two store employees picked the defendant's photograph out of a group submitted to them and a day later identified him at the police station, at which time the defendant was clean shaven. Each witness identified him immediately and positively. One of the witnesses, who had anticipated that he would be

shown more than one man, stated immediately upon seeing the defendant that he was the man and that it was not necessary to show anyone else. The reason for the one man lineup was that there were no other black men available at the time. The defendant acknowledged at trial that he had shaved his beard and mustache on the evening of the date of the offense charged.

On the above record it clearly appears that the pretrial identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. State v. Moss, 187 Neb. 391, 191 N. W. 2d 543. The record also is clearly sufficient to support a finding of guilt of the offense charged.

In order to properly consider the third assignment a statement of what occurred at sentencing is required. When brought before the court for sentencing on May 21, 1971, the defendant expressed dissatisfaction with the services of the public defender who had represented him at trial. Before the court he claimed in general terms a lack of investigation, prejudicial argument to the jury, and failure of counsel to argue that there was no proof the gun was a real gun. This last item was also the principal issue raised at a later hearing which we refer to and was coupled with a claim that his counsel should have taken pictures to show that there were no holes made by the discharge of a bullet. Because these last arguments are at least logically inconsistent with the defendant's defense of alibi and misidentification it can be seen that tactically it would have been unwise for counsel to assert or argue them.

The defendant had prior to May 21, 1971, indicated to the court that he did not wish to file a motion for new trial. At the hearing on May 21, 1971, he indicated he did and the court continued the matter to June 24, 1971. At that time the defendant orally and in writing "fired" the public defender as his counsel. The court then asked him if he was going to proceed on his own. The court

suggested to him he not proceed on his own and suggested he keep the public defender but "if you wish to discharge them, I am willing to allow you to do this." The following colloquy then occurred: "MR. REED: If he is brought up next to me, I will knock him out now. BY THE COURT: So you don't want him? MR. REED: If he comes up to me, I will knock him out right here. I want an attorney. I don't have an attorney. I want an attorney and I don't have an attorney. I want an attorney and I wish it to be plain in the record I want an attorney. BY THE COURT: I think it is plain in the record." The court then indicated he would sentence the defendant without counsel and then imposed sentence. The defendant then had a tantrum in front of the court, pounding upon the rail and repeating: "I do not want him. I do not want him. I do not want him. I do not want him. I do not want him." He then said: "I do not want him and I do not have an attorney here to represent me at the present time and if he steps up here beside me, I will knock him out."

In the light of the foregoing the assignment re the deprival of counsel at sentencing boils down to this: Is the defendant entitled without showing adequate and sufficient reason to demand change of appointed counsel? This court said no in State v. Bratton, 187 Neb. 460, 191 N. W. 2d 612. See, also, Annotation, 36 A. L. R. 3d, Public Defender Statutes—Construction, § 10, p. 1441; Annotation, 157 A. L. R., Counsel for Accused—Change of, p. 1226. In this case it is patent that the defendant's dissatisfaction with counsel had no reasonable basis. His lack of assistance by counsel at sentencing was the result of his own misconduct. If the defendant's wishes alone were the criteria to be followed he could change counsel each step of the proceeding without cause. The constitutional right to counsel does not extend this far.

AFFIRMED.

JOHN WISNIESKI, APPELLANT, V. ERNEST L. COUFAL ET AL., APPELLEES.
195 N. W. 2d 750

Filed March 24, 1972. No. 38102.

1. **Contracts: Property: Frauds, Statute of: Brokers: Sales.** Under the provisions of section 36-107, R. R. S. 1943, the contract between the broker and the owner must be in writing and signed by both parties, and it must describe the land to be sold and set forth the compensation of the broker.
2. ———: ———: ———: ———: ———. Under the provisions of section 36-107, R. R. S. 1943, the terms under which the owner is willing to sell the land need not be included in the contract between the broker and the owner.
3. **Contracts: Property: Frauds, Statute of: Evidence.** The description of the land in a contract under section 36-107, R. R. S. 1943, is sufficient if it contains data from which the land may be identified and ascertained with certainty and parol evidence is admissible to apply the description to the subject matter, if the parol evidence does not vary or contradict the written instrument.
4. **Contracts: Property: Sales: Brokers.** A broker is entitled to his commission in accordance with the terms of his listing contract and the right to compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed.

Appeal from the district court for Colfax County: C. THOMAS WHITE, Judge. Reversed and remanded.

Homer E. Hurt, Jr., for appellant.

Otradovsky & Bieber, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action by plaintiff, a real estate broker, to recover from the defendants, owners of a farm, a broker's commission under the terms of a listing contract. At the close of the plaintiff's case, the motion of the defendants for a directed verdict was granted. We reverse the judgment and remand the cause for further

proceedings consistent with this opinion.

We examine the evidence in the light of the following principle: A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Bradway v. Higgins, 152 Neb. 724, 42 N. W. 2d 627.

The plaintiff's evidence was that the plaintiff was a licensed real estate broker. He was approached by the defendant, Ernest L. Coufal, husband of the other defendant, and asked to find a buyer for their farm. As a result of this contact the farm listing contract was executed by all of the parties. The contract bore date of February 13, 1969, and was in part of follows: "IN CONSIDERATION of your agreement to list, and to offer for sale the property hereinafter described and to use your efforts to find a purchaser, I (we) hereby give you the sole and exclusive right until Mar 1, 1970 to sell 120 acres for the sum of Four hundred per acre (400.00) dollars and upon the following terms contract at 5%. . . . If a sale is made or a purchaser found before the expiration of this listing by myself (us) or any other person, at the above price and terms, or for any other price and terms I (we) may agree to accept, or if this agreement is revoked or violated by me . . . I (we) thereupon agree to pay you cash commission as follows: 5%. . . ."

The evidence further tended to establish that the defendants had orally agreed with the plaintiff that the sale would be made for $8,000 down, an annual payment of $1,800 for 10 years, and the balance at the end of that time. The plaintiff produced three buyers who were ready, willing, and able to purchase upon those terms. The defendants, however, rejected these purchasers, the first because the downpayment check was allegedly no good; the second because they felt he could not pay for it; and the third because he could not pay

for it. The plaintiff sold two of the purchasers other farms and the third otherwise purchased a farm.

Plaintiff then produced a fourth purchaser who the evidence showed was ready, willing, and able to make the purchase upon the above terms. When the check for the downpayment and the sales contract signed by these last purchasers were presented to the defendants they demanded $10,000 down and $2,000 per year. The plaintiff thereupon induced the purchasers to execute a purchase contract upon the new terms and make downpayment on that basis. The contract and checks were introduced into evidence. When the contract was presented to the defendants for signature they rejected it because they wanted more money for the farm and refused to sign it. The plaintiff then demanded his commission. The defendants refused to pay it and plaintiff brought this action.

At the trial the plaintiff offered the testimony of the defendant, Ernest L. Coufal, and by him established the execution by him and his wife of the listing contract; the legal description of the property which the defendants owned; that it contained 120 acres; and that at all times pertinent in this action it was the only farm owned by the defendants.

The defendants contend the listing contract does not meet the requirements of section 36-107, R. R. S. 1943, because: (1) The description of the property is insufficient; and (2) the terms of the proposed sale are not fully set forth in the listing contract and that this is a requirement of the statute. Section 36-107, R. R. S. 1943, requires that the contract between the broker and the owner must be in writing and subscribed by both parties. The last sentence of this section sets forth the required terms as follows: "Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." The position of the defendants essentially is that the case law applicable to section 36-105,

R. R. S. 1943, is applicable to section 36-107, R. R. S. 1943, and that this means the terms of the proposed sale must be set forth in the listing contract. Defendants cite Kubicek v. Kubicek, 186 Neb. 802, 186 N. W. 2d 923. The defendants' position on this point is not well taken. Section 36-107, R. R. S. 1943, requires that the listing contract must be in writing, signed by both parties, describe the land to be sold, and state the compensation. This is all it requires. The terms of the proposed sale need not be included in the listing contract. Massachusetts Mut. Life Ins. Co. v. George & Co., 148 F. 2d 42, 49; Svoboda v. De Wald, 159 Neb. 594, 599, 68 N. W. 2d 178; Holliday v. McWilliams, 76 Neb. 324, 107 N. W. 578; Bradley & Co. v. Bower, 5 Neb. (Unoff.) 542, 99 N. W. 490. Terms not required by the statute to be in writing may be supplied by parol. Bradley & Co. v. Bower, *supra*. We hold that the terms of sale need not be set forth in the listing contract, although it is of course the best practice for the parties to include the terms of sale.

Is the description in the contract sufficient? The case law on this point from the various jurisdictions is not uniform and the courts have varied in their determinations of how complete the description of the land must be in order to meet the requirements of the statute. Annotation, 30 A. L. R. 3d, Broker's Contract—Property Description, p. 935 at 962.

We have in this case a close question on the point, but we believe the description "120 acres" together with the parol evidence establishing that the defendants owned at all times relevant in this case just one farm and that it contained 120 acres is sufficient to satisfy the statute. This court has in early cases held descriptions such as the above which together with parol evidence not contradicting or varying that which appears in writing is sufficient to satisfy the terms of the statute as to description. Holliday v. McWilliams, *supra*, is such a case and there this court said: "'. . . In such cases

parol evidence is not used to vary, contradict or control the written contract of the parties, but to apply it to the subject matter, and thereby to render certain what would otherwise be doubtful and indefinite.' To the same effect is the holding of our own court in Ballou v. Sherwood, 32 Neb. 666, and Adams v. Thompson, 28 Neb. 53; . . . ." See, also, Powers v. Bohuslav, 84 Neb. 179, 120 N. W. 942; Ruzicka v. Hotovy, 72 Neb. 589, 101 N. W. 328.

If, of course, even after the parol evidence is supplied the court could not be certain the land is the tract referred to in the contract, the description would be insufficient. See, Howell v. North, 93 Neb. 505, 140 N. W. 779; McCarn v. London, 83 Neb. 201, 119 N. W. 251. The latter case was one for specific performance of a land contract. The description was the north . . . . . feet of a certain lot. Defendant owned the entire lot. The description was held insufficient to satisfy the statute.

The court should not have directed the verdict against the plaintiff. A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him. This right to compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Jones v. Stevens, 36 Neb. 849, 55 N. W. 251; Larson v. Syverson, 84 S. D. 31, 166 N. W. 2d 424.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BILLY DEAN BOOTH, APPELLANT AND CROSS-APPELLEE, V. HELEN N. BOOTH, APPELLEE AND CROSS-APPELLANT.
195 N. W. 2d 744

Filed March 24, 1972. No. 38131.

Appeal from the district court for Saline County: JOSEPH ACH and ERNEST A. HUBKA, Judges. Affirmed.

Jerry L. Snyder, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

AFFIRMED. See Rule 20. Defendant is allowed $750 for services of her attorney in this court.

ALFRED C. GLASER ET AL., APPELLEES, V. C. E. WEINBERGER ET AL., APPELLEES, JAMES A. HENDRICKSON, HIGH BIDDER, APPELLANT.
196 N. W. 2d 113

Filed March 24, 1972. No. 38186.

1. **Partition: Sales: Courts: Appeal and Error.** Where there has been an upset bid before a final confirmation of a partition sale, the matter of confirmation of the sale is left to the judicial discretion of the trial court with due regard to the stability of judicial sales. Such discretion is a judicial one which may not be arbitrarily exercised. This court will not intervene except in the case of an abuse of such discretion by the trial court.
2. **Partition: Sales: Property.** An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance.
3. **Partition: Sales: Property: Infants: Courts.** In determining

whether to accept or reject an upset bid, the court must elect between two conflicting duties. Ordinarily it must strive to obtain the best price possible for the property sold, especially where the interests of minors are involved. On the other hand, when the sale is free of fraud and an adequate price has been realized, consideration must be given to the rights of the purchaser and the stability of judicial sales.

Appeal from the district court for Greeley County: WILLIAM F. MANASIL, Judge. Reversed and remanded.

Thomas E. Brogan and James J. McNally, for appellant.

Harold E. Connors and Robert E. Paulick, for appellees Glaser.

Raymond P. Medlin and William Keeshan, for appellees Weinberger.

Heard before WHITE, C. J., SPENCER, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a partition action. The action was instituted by Alfred C. Glaser and wife. Plaintiffs owned adjoining land on which they had sunk an irrigation well. The 40-acre tract involved was part of a dry-land tract which had very recently sold at public auction for $134 per acre. Alfred C. Glaser, who with his wife owned an undivided one-half interest in the 40-acre tract, attended the partition sale and bid on the land which sold for $15,020, or $375.50 per acre, to appellant James A. Hendrickson. Hendrickson, whose father owns an adjoining 1,260 acres, obviously believes the irrigation well is on this tract notwithstanding a recent survey to the contrary.

Prior to confirmation, Glaser tendered an upset bid of $16,600. The court, bearing in mind the dispute as to the well location, found that the land sold for its fair and reasonable value as dry land but not as irrigated land and set aside the sale. We reverse the de-

cision of the district court and confirm the sale.

As we view the situation, plaintiffs, when they sunk the well in a location selected by them, necessarily assumed the risk that it might be on land of which they were not the sole owners. If the well is on the 40 acres in question, it has enhanced the value of that tract and resulted in a sale exceeding its dry-land value. This would, in some measure, recompense plaintiffs for the loss of the well. On the other hand, Hendrickson, who bid in excess of the dry-land value of the tract with the idea that he was also buying the well site, has taken a deliberate gamble. If the well becomes his, he has received a bargain, if it does not, he has paid a sum considerably in excess of the value of the land. Ownership of the well cannot be here resolved.

Under all the circumstances we find the partition sale to Hendrickson should be confirmed. Plaintiffs brought about the sale and one of them attended the sale and actively participated as a bidder. After suffering the land to be sold to another, Glaser now tenders an upset bid. To permit one who was not only the instigator of the sale and had ample warning that it was pending, but who also appeared and bid at the sale, to subsequently upset it would do much to destroy the stability and finality of judicial sales and to discourage bidding thereat. Had the land sold for considerably less than its reasonable value, a different picture would be presented. Such was not the case here. As a dry-land tract, it sold in excess of its value simply because one bidder was willing to gamble that he would acquire the irrigation well and could thereby irrigate the land. In view of the uncertainty attending the location of the well, it cannot be said that the land brought less than its reasonable value. The case presents an unusual situation wherein plaintiffs have had second thoughts regarding the amount they should bid.

This court held as follows in Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417: "Where there has been

an upset bid before a final confirmation of a partition sale, the matter of confirmation of the sale is left to the judicial discretion of the trial court with due regard to the stability of judicial sales. Such discretion is a judicial one which may not be arbitrarily exercised. This court will not intervene except in the case of an abuse of such discretion by the trial court."

The court also held: "An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance."

In determining whether to accept or reject an upset bid, the court must elect between two conflicting duties. Ordinarily it must strive to obtain the best price possible for the property sold, especially where the interests of minors are involved. On the other hand, when the sale is free of fraud and an adequate price has been realized, consideration must be given to the rights of the purchaser and the stability of judicial sales. This was well phrased when the court stated in Rupe v. Oldenburg, *supra:* "The rights of the highest bidder at the judicial sale whose bid has been accepted ought not to be lightly disregarded. It is true, of course, that such bid is subject to confirmation by the court. If upset bids were permitted and accepted under all circumstances, the holding of a judicial sale would be nothing more than preliminary bidding and not a method of purchasing the land. Such a practice would chill the bidding at the judicial sale by encouraging the filing of upset bids and render the judicial sale a mere formality and the elimination of the primary purpose of judicial sales. This is most harmful to the stability and true purpose of judicial sales which trial courts should not lightly disregard."

The exercise of the discretion vested in the trial court presents a close and difficult question. It must be re-

solved on the basis of the facts presented in each individual case. Under the facts presented, which duty outweighs the other? In this instance, an adequate price has been realized; all parties were competent, were present at the sale, and had every opportunity to protect their individual interests. We believe that the rights of the purchaser and the necessity of protecting the stability of judicial sales in this instance outweigh other considerations.

The judgment of the district court is reversed and the cause remanded with directions to confirm the original sale by the referee.

REVERSED AND REMANDED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROBERT RAY ROBERTS, APPELLANT.
196 N. W. 2d 118

Filed March 24, 1972. No. 38194.

Criminal Law: Statutes: Sentences. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

Thomas D. Anderson, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Robert Ray Roberts, pled guilty to Count

I, for possession, and Count II, for sale of marijuana. When defendant appeared for sentencing on June 4, 1971, Count I was dismissed, and defendant was sentenced for a period of 2 to 5 years in the Nebraska Penal and Correctional Complex on Count II. This was the penalty and sentence provided for a violation of section 28-472.02, R. S. Supp., 1969, which section was repealed, effective May 26, 1971. The new sections, 28-4,115(14) and 28-4,125(2), R. S. Supp., 1971, became effective May 26, 1971.

Defendant alleges two assignments of error: "1. The District Court erred in imposing a sentence which was contrary to law. 2. The District Court erred in imposing an unduly severe sentence without proper consideration and weight to the facts and circumstances in mitigation of the offense."

This court has recently ruled, in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225 (1971), and State v. Goham, 187 Neb. 35, 187 N. W. 2d 305 (1971), that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. This rule applies herein.

We have reviewed the presentence report on the defendant and are satisfied that the trial court did not abuse its discretion in sentencing the defendant to the Nebraska Penal and Correctional Complex.

We affirm the judgment of conviction herein, but modify the sentence to 1 to 5 years in the Nebraska Penal and Correctional Complex.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS OGLESBY, APPELLANT.
195 N. W. 2d 754

Filed March 24, 1972. No. 38239.

1. **Criminal Law: Evidence: Trial: Witnesses.** A conviction may rest on the uncorroborated testimony of an accomplice.
2. **Criminal Law: Evidence: Trial: Instructions: Witnesses.** The fact an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant, Thomas Oglesby, appeals from a conviction for breaking and entering a motor vehicle with intent to commit larceny. He challenges the sufficiency of the evidence to sustain the judgment.

The record shows that a truck owned by the A & W Distributing Company was broken into early on June 9, 1970, and 8 cases of beer were taken from the truck. The State produced evidence that the offense was committed by the defendant, Mickey Roach, and Benjamin R. Craig.

Both Roach and Craig were called as witnesses by the State. Craig refused to testify on the ground that his testimony might tend to incriminate him. On the motion of the State, the trial court ordered Craig to testify and granted him immunity from prosecution pur-

suant to section 29-2011.01, R. S. Supp., 1969.

Craig then testified that he had been at a party at Mike Nelson's house around June 9, 1970; that he, the defendant, and Roach left the party and went to the A & W Distributing Company where the defendant broke the lock on a beer truck and removed 8 cases of beer from the truck; and that they then returned to Mike Nelson's house where the beer was placed in an old automobile. Craig admitted he had testified at the preliminary hearing that he had stayed in the car while the defendant and Roach had committed the offense, which testimony was false. The defendant contends the testimony of Craig cannot be used to sustain the conviction because Craig, who was an accomplice, testified falsely at the preliminary hearing.

It is the rule in this state that a conviction may rest on the uncorroborated testimony of an accomplice. Jungclaus v. State, 170 Neb. 704, 104 N. W. 2d 327. The fact an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction. Smith v. State, 169 Neb. 199, 99 N. W. 2d 8; Rains v. State, 173 Neb. 586, 114 N. W. 2d 399. A proper cautionary instruction was given in this case.

The conviction in this case does not rest entirely upon the testimony of Craig, and his testimony was corroborated in part by other witnesses called by the State. The defendant's contention that the evidence was not sufficient to sustain the conviction is without merit.

The defendant denied that he committed the offense, and there were other conflicts in the evidence. These were questions for the jury. It is not the province of this court to determine the credibility of witnesses or weigh the evidence in a criminal case.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT NEWELL PILGRIM, APPELLANT.

196 N. W. 2d 162

Filed March 24, 1972. No. 38293.

Post Conviction: Res Judicata. Repetitive applications for post conviction relief may be deemed an abuse of judicial process.

Appeal from the district court for Dakota County: WILLIAM F. COLWELL, Judge. Affirmed.

Robert Newell Pilgrim, pro se.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and CLINTON, JJ.

CLINTON, J.

This is the second appeal in this court by the defendant in connection with post conviction relief and relates to the same prosecution as the previous post conviction proceeding. Defendant appears pro se because, as is shown by the records of this court, he refuses to recognize court-appointed counsel.

Defendant was convicted by verdict of a jury on May 11, 1967, of second degree murder. The victim was his wife. On direct appeal this court affirmed the conviction. State v. Pilgrim, 182 Neb. 594, 156 N. W. 2d 171. The prior appeal in the previous post conviction proceeding and in which the judgment of the trial court was affirmed is State v. Pilgrim, 184 Neb. 457, 168 N. W. 2d 368.

At the time this present proceeding was pending in the district court and at the time of the hearing on the show cause order in that court and to which reference is later made, the defendant also had pending an appeal in a habeas corpus proceeding before the United States Court of Appeals, 8th Circuit. That court denied relief and affirmed the finding and judgment of the United

States District Court for Nebraska. Pilgrim v. Sigler, 440 F. 2d 788. The Supreme Court of the United States denied the defendant's petition for writ of certiorari. Pilgrim v. Wolff, 404 U. S. 937, 92 S. Ct. 279, 30 L. Ed. 2d 250 (November 9, 1971).

In this proceeding the district court ordered the prosecution to show cause why the application below should not be granted. The prosecution filed a response which we interpret to contain: (1) An allegation that the proceeding constituted an abuse of process; and (2) allegations that the court had no jurisdiction because of the proceedings for the same relief then pending before the United States courts.

A hearing was held on the order to show cause at which the defendant was represented by counsel and evidence was adduced. The district court made detailed findings based on the evidence and its examination of the files and records. It found the defendant was entitled to no relief and that an evidentiary hearing on the application was not necessary. Findings of the district court determined that the defendant's application raised no constitutional issues not previously raised and that the other grounds, constitutional and otherwise, for relief had been previously raised or were known to the defendant and could have been raised on the original appeal.

We approve the various findings of the district court and deem, just as did the district court, that the present proceedings are an abuse of judicial process. See American Bar Association Standards Relating to Post-Conviction Remedies, Approved Draft, § 6.1(c), p. 85, and § 6.2(b), p. 91.

The defendant's claims have now been considered four times, twice on the merits and twice by way of hearings on orders to show cause directed to the prosecution. The claims have been repetitive or previously known and not asserted. All litigation, including reviews of convictions for crime, must ultimately come to

an end. We now consider that all matters in connection with defendant's conviction on May 11, 1967, are res judicata.

AFFIRMED.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A UNITED STATES CORPORATION, APPELLANT, V. DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA ET AL., APPELLEES.

196 N. W. 2d 105

Filed March 31, 1972. No. 37932.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. On motion for rehearing. See 187 Neb. 562, 192 N. W. 2d 736, for original opinion. Motion for rehearing overruled.

John W. Delehant, John E. Dean, and Robert J. Huck, for appellant.

Ralph H. Gillan, for appellee Department of Banking.

James J. Fitzgerald, Jr., Lyle E. Strom, and Douglas W. Reno, for appellee Commercial Sav. & Loan Assn.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

NEWTON, J., dissenting.

This case involves the issuance of authority, without notice to other savings and loan associations, to open a branch savings and loan association.

Article I, section 3, Constitution of Nebraska, provides that no person shall be deprived of "life, liberty, or property," without due process of law. The Fifth and Fourteenth Amendments to the Constitution of the United States contain identically the same provision. In the present case, it is readily apparent that "life or liberty" are not threatened. If the due process clause

is applicable, it must be solely on the theory that an existing savings and loan association has a "property right" in a continued monopoly of business in its area. In other words, although the association's charter is in no way affected, it has a property right in the "limitation of competition." This is the only theory upon which the finding of a violation of "due process" in the case at issue can rest and this theory is not applicable.

In Hohorst v. Greenville Bus Co., 17 N. J. 131, 110 A. 2d 122, it is stated: "Adverse effect on operators of existing bus services incidental to creation of new competing bus line may readily be justified by significant furtherance of paramount public interest and will not constitute any unconstitutional deprivation of property."

In Franklin National Bank v. Superintendent of Banks, 243 N. Y. S. 2d 507, 40 Misc. 2d 565, it is stated: "Existing licensees have no standing to maintain special proceeding to review granting of additional license to another, merely because of economic effect on them of additional competition which would result. * * *

"First bank had no legal standing to obtain judicial review of action of Banking Board of State Banking Department in approving application of second bank to open branch office in community where first bank operated two branch banking offices."

In Eastern Airlines, Inc. v. Civil Aeronautics Board, 185 F. 2d 426, it is said: "Even though no Act of Congress requires a hearing, the Administrative Procedure Act must be followed where a hearing is necessary to the protection of constitutional rights. * * * But that rule is not pertinent here. Eastern is complaining of damage by competition which it says was made possible by unauthorized administrative action. The Constitution does not guarantee protection against such damage."

In Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543, it is held: "Where neither charters nor local franchises of public utilities granted monopoly or rendered com-

petition illegal, competition of Tennessee Valley Authority did not constitute an invasion of the utilities' charter or franchise rights, so as to give them a standing to challenge constitutionality of Tennessee Valley Authority Act. * * *

"A franchise to exist as a corporation and to function as a utility in the absence of a specific charter contract on the subject creates no right to be free of competition and affords corporation no legal cause of complaint by reason of state's subsequently authorizing another to enter and operate in same field. * * *

"Nonexclusive local franchises, while having elements of property, confer no 'contractual' or 'property right' to be free of competition either from individuals or other public utility corporations or the state or municipality granting the franchise."

In Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130, 53 S. Ct. 546, 77 L. Ed. 1080, it is said: "The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation. * * * But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards."

In First National Bank v. First Federal Sav. & Loan Assn., 225 F. 2d 33, it was held that other financial institutions were without standing to challenge the granting of permission to savings and loan associations to establish branch offices.

In First National Bank of Smithfield v. Saxon, 352 F. 2d 267, dealing with the establishment of a branch bank, it was held: "Procedural due process is not of-

fended by the Comptroller's practice. The absence of a hearing provision in the Banking Act raises no Constitutional question, for the omission was within the power of Congress."

Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board, 350 F. 2d 733, involved a rule-change affecting the time allowed travel bureaus to remit proceeds to airlines. The court stated: "Similarly, the economic competition made possible by the alleged unauthorized administrative action in this case does not entitle the petitioner to a hearing. * * * The petitioner has no license or exclusive franchise protected by law, and although it may be injured—or even ruined—by competition, this is lawful competition presenting a clear case of damnum absque injuria."

In Central Sav. & Loan Assn. of Chariton v. Federal Home Loan Bank Board, 293 F. Supp. 617, it was held: "Decisions with respect to applications for charters, branches, agencies and similar matters relating to federal savings and loan associations are committed to the exclusive discretion of the federal home loan bank board; the board is not required to hold an adjudicative hearing prior to exercising its authority in such matters."

In Bridgeport Fed. Sav. & Loan Assn. v. Federal Home Loan Bank Board, 307 F. 2d 580, it was held: "It was not necessary under the Administrative Procedure Act that Federal Home Loan Bank Board hold a hearing on application of a chartered federal savings and loan association's application to establish a branch office."

In Bank of Dearborn v. State Banking Commissioner, 365 Mich. 567, 114 N. W. 2d 210, on issue of establishment of a branch bank, the court stated: "Plaintiff says it was denied due process of law by secret, ex parte proceedings before the commissioner on defendant bank's application, had without notice to or opportunity to be heard in opposition by plaintiff. The statute re-

quires no notice. Plaintiff's constitutional rights of due process do not extend to a right to be free from competition. * * * The 14th amendment to the Constitution of the United States does not protect a business against the hazards of competition."

In Continental Bank v. National City Bank, 245 F. Supp. 684, it is held: "Where state bank was not shown to have an exclusive license to operate in particular area involved and where operation of national bank's branch in no manner excluded state bank from operating in that area, procedural due process did not require that state bank be given full adversary type hearing or trial on national bank's application to establish such branch."

In American Bank & Trust Co. v. Saxon, 248 F. Supp. 324, it is held: "Comptroller of currency of the United States of America was not required to grant formal adversary hearing to protestant of application by national bank for branch office."

In Citizens National Bank of Maplewood v. Saxon, 249 F. Supp. 557, it is held: "Comptroller of the Currency was not required to hold a formal hearing at which commercial banks could present objections relative to issuance of a national bank charter. * * *

"The holding of a hearing regarding issuance of charter to national bank is controlled by the discretion of the Comptroller."

In Sterling National Bank of Davie v. Camp, 431 F. 2d 514, it is stated: "Comptroller of Treasury, in determining whether to grant charter for new national bank, was not required to conduct formal adversary hearing and was entitled, without knowledge of charter opponents, to accept and consider information sent to his office by applicants."

As was eloquently stated in Cement National Bank v. Department of Banking, 425 Pa. 554, 230 A. 2d 209: "Banks often forget that they are merely creatures of a Legislature or of Congress, and have only such rights as are granted by statute or by Congressional Act, as

the case may be. The Legislature can grant such powers and impose such conditions and limitations as it desires on all banks and other bodies it creates, provided the same are not unlawful or unconstitutional; and in particular, the Legislature is not required to provide for hearings before its created bodies such as are constitutionally required in judicial proceedings. * * * the Legislature is not required to provide, * * * for hearings at the Department level. The denial of a Judicial or a public or adversary hearing before the Department of Banking or even before a Banking Board is not a violation of procedural due process or of any other Constitutional right." Similar holdings can be found in: Elizabeth Fed. Sav. & Loan Assn. v. Howell, 24 N. J. 488, 132 A. 2d 779; Peoples Bank of Van Leer v. Bryan, 55 Tenn. App. 166, 397 S. W. 2d 401; First National Bank v. First Federal Sav. & Loan Assn., 225 F. 2d 33; Bridgeport Fed. Sav. & Loan Assn. v. Federal Home Loan Bank Board, 307 F. 2d 580; First National Bank of Smithfield v. Saxon, 352 F. 2d 267; Guaranty Savings & Loan Assn. v. Federal Home Loan Bank Board, 330 F. Supp. 470; First Nat. Bank of Whippany v. Trust Co. of Morris County, 76 N. J. Super. 1, 183 A. 2d 706; First National Bank of Abbeville v. Sehrt (La. App.), 246 So. 2d 382. See, also, Davis, Administrative Law Treatise, c. 4, § 4.04, but see contra, Conestoga National Bank of Lancaster v. Patterson, 442 Pa. 289, 275 A. 2d 6.

This is basically because the statutes regulating financial institutions do not confer a vested right or interest of limited competition upon the institution but rather: "It intends in the interest of the public, to insure safe banking. It does not intend to create a monopoly nor to deter private individuals from engaging their activities in banking except insofar as a proper regulation of banks in the interest of the public has such effect. * * *

"It does not intend that one or more established banks

may keep out another because the banking facilities sufficiently take care of the banking business. Its purpose is not to deter competition or foster monopoly, but to guard the public and public interests against imprudent banking." State ex rel. Dybdal v. State Securities Commission, 145 Minn. 221, 176 N. W. 759. See, also, Moran v. State Banking Commissioner, 322 Mich. 230, 33 N. W. 2d 772; Peoples Savings Bank v. Stoddard, 359 Mich. 297, 102 N. W. 2d 777.

In Elizabeth Federal Sav. & Loan Assn. v. Howell, 24 N. J. 488, 132 A. 2d 779, the Commissioner of Banking and Insurance granted permission to the Colonial Savings and Loan Association to establish a branch office in Elizabeth through the purchase of the Excelsior Building and Loan Association in Elizabeth and move it to a substitute location. The appellant's competitors objected to any such approval and sought review. It was held: "As pointed out above, a competitor may in the public interest attack the administrative action here involved. As such, a competitor may urge the question whether the Commissioner's action exceeded his power or constituted an arbitrary exercise of it. The objecting institutions, however, urge they are entitled to notice of hearing and the status of a party to the proceeding with the broader review which that status would afford. There is no constitutional basis for this further claim; if it exists, it is only because of a statutory provision for it."

It would appear evident that the due process clause is not an issue and has not been violated in this instance.

It further appears that the Administrative Procedure Act is inapplicable. Section 84-913, R. S. Supp., 1969, requires notice and hearing *only* in contested cases. Section 84-901, R. R. S., 1943, defines a contested case as follows: "Contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." The

controlling statutes, as conceded in the original opinion, do not require an agency hearing and as herein pointed out, none is constitutionally required.

The result arrived at in the opinion adopted would, however, appear to be correct. The Department of Banking had a rule requiring notice and hearing. The rule was binding upon the department and could not be ignored. See, Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715; 2 Am. Jur. 2d, Administrative Law, § 309, p. 138; 73 C. J. S., Public Administrative Bodies and Procedure, § 107, p. 428.

I disagree with the action of the majority of the court in overruling the motion for rehearing.

BOSLAUGH and SPENCER, JJ., concur in order overruling motion for rehearing.

The findings required by section 8-331, R. R. S. 1943, before a certificate of approval may be issued are adjudicative facts which can only be determined by an exercise of quasi-judicial power. Interested parties must be afforded notice and an opportunity to be heard before such a power may be exercised. School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458; Allen v. Omaha Transit Co., Inc., 187 Neb. 156, 187 N. W. 2d 760.

We also agree with Judge Newton that the rule of the Department of Banking, requiring notice and hearing, was binding on the department.

The motion for rehearing should, therefore, be overruled.

WHITE, C. J., took no part in the consideration or decision in this case.

IN RE PROPOSED AMENDMENT TO CHAPTER III OF THE COMMISSION RULES AND REGULATIONS.
NEBRASKA STATE RAILWAY COMMISSION, APPELLEE, V. SEWARD MOTOR FREIGHT, INC., ET AL., APPELLANTS, IMPLEADED WITH WADE BUS LINES ET AL., APPELLEES.
IN RE APPLICATION OF SEWARD MOTOR FREIGHT, INC.
SEWARD MOTOR FREIGHT, INC., APPELLANT, V. BEE LINE MOTOR FREIGHT, INC., ET AL., APPELLEES, CLARK BROS. TRANSFER, INC., INTERVENER-APPELLEE.
196 N. W. 2d 200

Filed March 31, 1972. Nos. 38067, 38055.

1. **Public Service Commissions: Motions, Rules, and Orders: Carriers.** The failure of the Nebraska State Railway Commission previous to January 1, 1968, to enunciate a rule and regulation on tacking cannot be construed to imply that the right to tack was inherent in certificates heretofore issued unless specifically restricted.
2. ———: ———: ———. The right to prohibit the tacking of regular to irregular route authorities, or irregular to irregular route authorities, is a policy determination within the inherent authority of the Nebraska State Railway Commission.
3. **Public Service Commissions: Carriers.** Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes.
4. ———: ———. Tacking is an extension of the authorized service and must be and is under the regulation of the Nebraska State Railway Commission rather than being left to the unbridled discretion of carriers subject to regulation by the Commission.
5. **Public Service Commissions: Motions, Rules, and Orders: Appeal and Error.** On appeal from an order of the Nebraska State Railway Commission administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order is reasonable and not arbitrarily made.

Appeals from the Nebraska State Railway Commission. Judgments affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, J. Max Harding, Charles J. Kimball, David R. Parker, Gailyn L. Larsen, and Acklie & Peterson, for appellants.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee Nebraska State Railway Commission.

Einar Viren, for appellee Bee Line Motor Freight, Inc.

James E. Ryan, for intervener-appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Appeals Nos. 38067 and 38055 were consolidated in this court for the purposes of briefing and argument, and, because they are closely related, we shall consider them together.

Case No. 38067 involves the adoption of an amendment to Chapter III of the Rules and Regulations of the Nebraska State Railway Commission concerning the tacking or joining of motor common carrier authorities in the State of Nebraska. We affirm the right of the Commisison to adopt the amendment.

Case No. 38055 involves the application of Seward Motor Freight, Inc., hereinafter referred to as Seward, to tack its regular and irregular route authorities. Those authorities are as follows: "Commodities generally, except those requiring special equipment. Regular Route: Between Omaha and Grand Island, via US-6 to Lincoln; thence via US-34 to junction with US-281; thence via US-281 to Grand Island, serving all intermediate points and the off-route points to Bee, Tamora and Phillips.

"RESTRICTION: No local service to be performed between Omaha and Lincoln or points intermediate thereto.

"Irregular Route: Between points within a 10-mile radius of Seward, and between points within said radial area on the one hand, and, on the other hand, points in Nebraska." The application to tack the authorities was denied. We affirm.

On March 15, 1971, the Nebraska State Railway Com-

mission entered the following order: "Motor common carriers shall not tack their irregular route authorities nor shall they tack their irregular and regular route authorities. Motor common carriers may tack their regular route authorities." This order, which will be hereinafter referred to as Rule 19, was entered pursuant to notice published December 10, 1970, and hearings held on January 26, 1971, February 19, 1971, and March 5, 1971. The original published notice was broader than the order entered in that it would have prevented the tacking of regular authorities. The order as entered prohibits tacking of irregular route authorities and the tacking of irregular and regular route authorities, but specifically authorizes the tacking of regular route authorities.

The protestants and objectors are the following appellants herein: Seward Motor Freight, Inc.; Booth Transfer, Inc.; Ideal Truck Lines, Inc.; Logan Valley Transfer, Inc.; Stromsburg Motor Freight, Inc.; Nebraska City Transfer; Arrow Freight Lines, Inc.; and Young and Hay Transportation, Inc.

Appellants set out nine specific assignments of error. We notice the following: "1. The order of the Commission in the Rule and Regulation No. 19 proceeding was entered without jurisdiction or power to enter it.

"2. Said order deprives appellants of rights and property without due process of law in violation of the due process clauses of the Nebraska and U. S. Constitutions.

"3. Said order is arbitrary and unreasonable. * * *

"5. The Commission erred in finding that said order will best serve the public interest, 'protect existing certificates,' and that tacking of regular route and irregular route motor common carrier authorities or irregular route authorities should not be allowed.

"6. The Commission erred in concluding that it could not effectively and efficiently regulate the motor common carrier industry or best serve the public interest if such tacking is allowed and that tacking 'tends to elim-

inate and destroy the restrictions and limitations placed in certificates.' "

The position of the appellants is bottomed upon the erroneous assumption that before the adoption of Rule 19, they had a legal right to tack regular and irregular authorities and that it was not necessary to obtain express authorization from the Commission. In fact, their argument is predicated on the assumption that the Commission is now prohibiting a right granted by their certificates of authority. Except in instances where the right to tack has been specifically granted by the Commission, the right does not exist. It is not an implied right inherent in existing certificates.

While the Commission had granted and prohibited the tacking of authorities in the past, until 1966 it had no clearly defined tacking practice policy. Its failure previous to January 1, 1968, to enunciate a rule and regulation on tacking cannot conceivably be construed to imply that the right to tack was inherent in the certificate heretofore issued unless specifically restricted. The question is not as assumed by appellants, whether the Commission had previously indicated that tacking was not permitted, but rather has the Commission ever held that tacking was permitted unless specifically prohibited. The answer must be in the negative. We hold the right does not exist unless specifically granted.

On May 31, 1966, Romans Motor Freight, Inc., filed a petition for the institution of a general investigation and for issuance of general orders with respect to tacking of authorities. A hearing was held, "In the Matter of a General Investigation of Tacking of Authorities," on September 12, 1966. At that hearing counsel for Romans suggested the problems involved and the need for an order to clarify the issues. Another public hearing was held on March 14, 1967. Pursuant to those hearings, the Commission on October 9, 1967, entered Rule and Regulation Order No. 8, to become effective on January 1, 1968. This rule provided that motor carriers should not

tack their irregular route authorities and, unless specifically authorized by the Commission after notice and hearing, they should not tack their irregular route and regular route authorities nor tack their regular route authorities. As used in the rule, "tacking" included the terms "joining" and "combining."

On December 7, 1967, the Commission entered Rule and Regulation Order No. 10 pursuant to a public hearing held on November 29, 1967, providing that the provisions of Rule and Regulation Order No. 8, pertaining to regular route authorities, should not apply to such authorities granted on or before December 31, 1967.

We set out pertinent legislative provisions so far as material herein. Section 75-109, R. R. S. 1943, provides: "The commission shall have the power to * * * exercise a general control over, all common carriers * * *."

Section 75-110, R. S. Supp., 1969, provides: "* * * The commission shall also promulgate regulations which the commission deems necessary to regulate persons within the commission's jurisdiction. The commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action be taken pursuant to a rule, regulation, or statute."

Section 75-301, R. R. S. 1943, provides: "It is hereby declared to be the policy of the Legislature to (1) regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers, in the public interest; (2) promote adequate economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices; (3) improve the relations between and coordinate transportation by, and regulation of, motor carriers and other carriers; (4) develop and preserve a highway transportation system properly adapted to

the needs of the commerce of Nebraska; (5) cooperate with the several states and the duly authorized officials thereof; and (6) cooperate with the Interstate Commerce Commission in the administration and enforcement of the Federal Motor Carrier Act, 1935, approved by the President on August 9, 1935. The Legislature declares that all of the available carriage service, including common carriage by rail and road, and contract carriage by road, are so interdependent that the public may not continue to have a safe, dependable transportation system unless contract carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers."

Section 75-309, R. S. Supp., 1969, provides: "It shall be unlawful for any common or contract carrier by motor vehicle subject to the provisions of articles 1 and 2 of this chapter and sections 75-301 to 75-322.01 to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such common carrier a certificate of public convenience and necessity, or a permit to such contract carrier, issued by the commission authorizing such operation."

Section 75-311, R. S. Supp., 1969, provides in part: "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, is or will be required by the present or future convenience and necessity; otherwise said application shall be denied."

To put the problem in proper perspective, understanding of the differences in the authorities is necessary.

For the purposes of this opinon, regular route authority covers the transportation of property in intrastate commerce by motor vehicles between fixed termini and over a specified highway or highways upon a fixed schedule. Irregular authority covers the transportation of property in intrastate commerce by motor vehicle over irregular routes at any time convenient to the carrier over any convenient highways from a base point to any place within a defined radial area, or from any place within the area to the base point, or in the case of irregular nonradial authority, between points in the area without reference to a fixed base point. Simply stated, the practice of tacking involved herein is the operation by a carrier between two or more of its irregular routes or between irregular and regular routes in order to reach a point which could not legally be served by operation over any single irregular or regular route or combination of regular routes.

Appellants have not produced any Nebraska citations to support their contention that a right to tack existed prior to the adoption of a general policy by the Commission. In fact, counsel for appellants stated at the hearing: "Now, there's never been a rule adopted by this Commission from the time the Motor Carrier Act was passed until the first rule was adopted effective January 1, 1969, that had anything at all to do with tacking or interlining. There were some representations made by Commission personnel, including myself when I worked for this esteemed body, that you couldn't tack regular and irregular authority, but there was never a regulation of any sort adopted on it until January 1, 1969." Counsel was wrong as to the date. Rule and Regulation Order No. 8 to which he refers became effective on January 1, 1968.

To permit unlimited tacking when the certificates now in effect were not issued with reference to that right, violates the intent and purpose of the law relating to common carriers. To do so expands certificated author-

ity in violation of the intent of the Commission in granting the original certificates of authority. It is the certificate which determines the terms or extent of the carrier's operations. If the right to tack is not specifically granted, it does not exist. Contrary to the contention of the appellants, we agree with the Commission that in order to best serve the public interests and to protect existing certificates of public convenience and necessity heretofore issued by the Commission, the tacking or joining of regular to irregular route authorities, as well as irregular to irregular route authorities, should no longer be allowed, and that proposed Rule 19 should be adopted.

The determination of this policy by the Commission is within its inherent jurisdiction. We respect its finding that it cannot effectively and efficiently regulate the motor carrier industry or best serve the public interest if it continues to allow such tacking of authorities. We accept its conclusion that the tacking prohibited herein tends to eliminate and destroy the limitations and restrictions placed upon such certificates of public convenience and necessity by the Commission's orders and rules and regulations. Henceforth, where there is a need for irregular service into an area or community outside the central radius of an irregular route radial authority, an application must be made to the Commission to serve such point or points as an additional base point to the carrier's irregular route authority. Likewise, if there is a need for service to an area or community on a regular basis, such areas or communities can be served by making application to the Commission to serve these points as off-route points to the carrier's existing regular route. Such applications will be granted by the Commission upon a showing of the statutory requirements of the carrier's fitness and public convenience and necessity.

To illustrate, Seward Motor Freight, Inc., has regular route authority between Omaha and Grand Island via

Lincoln and Seward, and irregular route authority between points and places within a 10-mile radius of Seward and between points and places within said radial area and points and places in Nebraska. Tacking of its regular and irregular route authorities would destroy the type of certificates under one or both of the authorities. For example, if Seward began to conduct operations regularly from Omaha to Seward, and then on its irregular route authority to the communities within that authority, it would be transforming its irregular route authority to a regular route authority to those towns. On the other hand, if it was not limited to the towns within the 10-mile radius but rather it hauled shipments from Omaha to Seward and then to various points in the State of Nebraska on an irregular basis, then it would be performing irregular route operations on the regular portion of its certificate from Omaha to Seward. In this way the granting of regular and irregular route tacking can destroy the classifications the Commission has made through its rules and regulations on one or both of the authorities. It is no answer to assert that the Commission has power to control abuses. The feasibility and propriety of this expansion of the certificates has never been considered by the Commission. It has had no opportunity to consider the public convenience and necessity of the expanded authority.

To find prescriptive rights to tack would expand the scope of the authorities tacked without giving the Commission the opportunity to determine the necessity for such expansion under section 75-311, R. S. Supp., 1969. Seward argues that denial of its right to tack will deprive some towns of the service it is able to perform. We appreciate that in the interest of effective and efficient regulation of motor carriers there will be some such problems. As the record discloses, the towns listed by Seward as being adversely affected are not totally without remedy.

Appellants contend that Rule 19 was entered without

jurisdiction or power to enter it. Section 75-110, R. S. Supp., 1969, specifically requires the Commission to adopt rules and regulations which it deems necessary to regulate persons within its jurisdiction. Section 75-118.01, R. S. Supp., 1969, gives the Commission original, exclusive jurisdiction to determine the validity of a rule or regulation and the scope and meaning of a certificate.

There can be no question that Rule 19 is within the ambit of authority granted to the Commission by section 75-109, R. R. S. 1943, and sections 75-110, 75-310, and 75-311, R. S. Supp., 1969. To hold otherwise would destroy the effectiveness of those sections. There may be instances where tacking could be permitted without undue interference with other certificates of authority, but these are policy questions within the jurisdiction of the Commission.

There is no merit to appellants' contention that the order deprives them of rights and property without due process of law. As suggested heretofore, the order is not a limitation, revocation, change, or modification of any authority previously granted, as contended by appellants in claiming the Commission is acting retrospectively so as to restrict or reduce valuable rights. Section 75-313, R. R. S. 1943, so far as material herein, requires that: "Each certificate shall specify the service to be rendered, the routes, the fixed termini, if any, and the intermediate and off-route points, if any, and in case of operations not over specified routes or between fixed termini, the territory within which such carrier is authorized to operate. Each permit shall specify the business of the contract carrier covered thereby and the scope thereof." Seward has no rights other than those specifically granted by its present certificates of authority.

Unless tacking was specifically authorized by the Commission, Seward had no right to tack its regular and irregular route authority. The fact that it may have performed unauthorized operations under the im-

pression that it had such right does not create a property right or a right to tack. Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes. Interstate Common Carrier Council of Maryland, Inc. v. United States, 84 F. Supp. 414, affirmed, 338 U. S. 843, 70 S. Ct. 91, 94 L. Ed. 516.

Appellants argue that most states permit tacking but cite no statutory or case authority for it in Nebraska. Our observation is that in those jurisdictions which permit it, the original certificates were probably issued in the light of that practice and the certificating agency had an opportunity, in the light of the practice, to attach conditions to the certificates where the public interest would not be served. In any event, tacking is an extension of the authorized service and must be and is under the regulation of the Commission rather than being left to the unbridled discretion of the carriers subject to regulation by the Commission.

Rule 19 was adopted by the Commission pursuant to an informal, nonadvisory type proceeding had by the Commission on its own initiative. Notice of the hearing was published and a copy of the notice was sent to those who could be affected. This proceeding was within the ambit of the Commission's jurisdiction and we find no fault with the procedure adopted. The order adopted is of a legislative nature, with general application to all carriers within a certain class. We have frequently said that on an appeal from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order is reasonable and not arbitrarily made. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The Seward application was largely predicated on its claim that for several years it had tacked its regular and irregular route authorities at the common point of

Seward. As heretofore suggested, this operation was conducted under the erroneous assumption by the appellant that it was permitted to do so. It did not have that right, and the evidence of such operation cannot be used to invoke a prescriptive right to tack. Consequently, the denial of the right is not unreasonable or arbitrary. The fact that tacking, herein prohibited, may have previously been permitted after hearing in some instances, does not change that situation. In view of our holding on the amended rule and regulation herein, the action on the Seward application is affirmed. The relief available to Seward is the filing of applications for the amendment of its authority, as suggested above.

JUDGMENTS AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent.

The majority opinion holds the "tacking" of unrestricted authorities is illegal and in violation of the intent of the Commission in granting the original certificates. It also states: "If the right to tack is not specifically granted, it does not exist." There is no authority for those statements and they are flatly contradicted by repeated holdings of the Interstate Commerce Commission and federal courts as applied to interstate carriers.

In Aetna Freight Lines, Inc., Interpretation of Certificate, 48 M. C. C. 610 (1948), the Interstate Commerce Commission said: "The right of the motor common carrier to tack separate grants of unrestricted authorities is well settled regardless of whether the authorities involve regular routes, irregular routes, or a combination of both." To the same effect, see M. I. O'Boyle & Son, Inc. v. E. Brooke Matlack, Inc., 81 M. C. C. 201 (1959). As to the type of situation involved here, see Malone Freight Lines, Inc. v. United States, 107 F. Supp. 946 (1952), affirmed, Per Curiam, 344 U. S. 925, 73 S. Ct. 497, 97 L. Ed. 712 (1953).

It should be noted also the evidence discloses that

from the very beginning of motor carrier regulation in Nebraska, tacking of regular and irregular route segments of authority, as well as tacking of two irregular route segments, was permitted except where specifically prohibited. Until 1966, the Commission had no rule or regulation prohibiting or limiting carriers' right to tack generally and there had never been any statutory prohibition against operations involving tacking of any kind. The record here does not show any specific findings of fact which will support the Commission's general prohibitory order applied retroactively as it was. The findings constitute statements of opinion of the Commission, reflecting the policy decision involved without the requisite factual support for such retroactive effect.

In addition to the overall issues involved in the general order prohibiting tacking, the majority opinion here affirms the order of the Commission denying the application of Seward Motor Freight, Inc., for the right to tack its own specific certificates. The only evidence in the record demonstrated that its services involving tacking on its own routes is needed by many shippers and some entire communities who would otherwise have no service or very inadequate service. There is no evidence that any other existing carrier could serve the need as well as the applicant. No carriers opposed the application. The evidence was clear that the operations provided by the tacking of authorities by Seward Motor Freight, Inc., and covered by the application had been conducted over a long period of time under color of authority. The test in such circumstances was set down in Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 118 N. W. 2d 498. The test is (1) whether the operation will serve some useful purpose responsive to a public demand or need; (2) whether the purpose can or will be served as well by existing carriers; and (3) whether it can be served by applicant without endangering or impairing the operations of existing carriers contrary to the public interest.

Even if it be conceded that the Commission had authority to determine a general tacking policy, at least prospectively, there are no specific findings of fact to support the general order prohibiting tacking conducted over a period of years under color of authority and with the full knowledge and tacit consent of the Commission. Neither is there evidence in the record to support the specific denial of the application of Seward Motor Freight, Inc. The action of the Commission in both instances was arbitrary and unreasonable and should have been set aside.

STATE OF NEBRASKA, APPELLEE, V. DENNIS G. RADCLIFF, APPELLANT.
196 N. W. 2d 119

Filed March 31, 1972. No. 38119.

1. **Constitutional Law: Ordinances: Trial: Evidence: Appeal and Error.** The question of the constitutionality of a city ordinance may not be considered by this court unless it is properly presented or offered in evidence in the district court.
2. **Trial: Evidence: Appeal and Error.** Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Admission of photographs is largely within the discretion of the trial court and unless an abuse of discretion is shown, error may not be predicated thereon.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Johnston, Grossman & Johnston, for appellant.

Richard C. Wood, Jerry C. Nelson, Hugh S. Atkins, and Norman Langemach, Jr., for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an appeal from two convictions after a trial

de novo in the district court for Lancaster County, before a jury, for violations of an ordinance of the City of Lincoln, Nebraska. On appeal, the defendant contends (1) that the ordinance under which he was prosecuted is unconstitutional, and (2) that the evidence was insufficient to support the verdict. We affirm the judgment of the district court.

The defendant was convicted under complaints which charged that the defendant unlawfully permitted a non-operating motor vehicle to remain on property which he has charge of for more than 30 days contrary to the ordinance. It appears from the record that the defendant was prosecuted under section 10.30.040 of ordinance No. 8664, of the City of Lincoln, Nebraska. The primary thrust of defendant's argument is that ordinance No. 8664 is unconstitutional. A review of the record in this case reveals that the ordinance (No. 8664), which is recited in the defendant's brief, is nowhere contained in the evidence in the bill of exceptions or otherwise presented in the record. It therefore appears that the assignment of error as to the constitutionality of the ordinance, in whole or in part, is not before us for consideration. State v. Novak, 153 Neb. 596, 45 N. W. 2d 625; State v. Hohensee, 164 Neb. 476, 82 N. W. 2d 554; Maxwell v. Steen, 93 Neb. 29, 139 N. W. 683; Steiner v. State, 78 Neb. 147, 110 N. W. 723; Dell v. City of Lincoln, 168 Neb. 174, 95 N. W. 2d 336. Perhaps the best statement of the rule precluding consideration of the constitutionality in the situation presented to the court in this case is contained in State v. Novak, *supra*. In that case it was argued that the city ordinance under which the defendant was prosecuted was violative of constitutional provisions. The ordinance, as here, was not before the court. There this court said as follows: "* * * failure to properly present an ordinance that is being attacked precludes our consideration of it here. * * * '* * * A party relying upon such matters must make them a part

of the bill of exceptions, or in some manner present them as a part of the record.' * * *

"Under the foregoing holdings the district court * * * could take judicial notice of an ordinance * * *, but if it took judicial notice of an unconstitutional ordinance it was the duty of the defendant to offer evidence of that fact if the error is to be preserved. *Recitals contained in objections or motions purporting to set forth portions of the ordinance do not meet the requirement.* * * * We cannot indulge in a presumption that the district court erred in this respect; it must be shown by the record." (Emphasis supplied.)

It therefore appears clear, under the authorities cited, that the failure to properly present an ordinance as a part of the record in the district court precludes the consideration of its constitutionality or validity in this court.

The defendant next attacks generally the sufficiency of the evidence to sustain the finding that the defendant was storing or parking a nonoperating vehicle on his property beyond a period of time permitted by the ordinance. We consider this question in the light of the court's instruction with reference to the term "nonoperating vehicle" as used in the ordinance. The instruction was as follows: " * * * a vehicle that because of some lack, fault, or defect, or some other substantial reason related to said vehicle can not be immediately used for the purposes for which it was intended. A vehicle stopped or parked because of some wholly temporary failure or the occurrence of an emergency relating to the vehicle or the operator thereof is not included in the prohibition." It is not assigned as error or contended that this instruction defining the meaning of the term "nonoperating vehicle" was in error.

We evaluate the evidence briefly under the definition as given in the court's instruction. The evidence is somewhat conflicting but generally is almost undisputed. The evidence of the city sustains a finding of the following facts: Behind his house in the residential sec-

tion of Lincoln, at 5000 North Cotner Boulevard, the defendant owned and had parked a 1955 Dodge and a 1958 white and pink DeSoto automobile. Pictures of these vehicles were identified and presented to the jury for its consideration. Both cars were unlicensed in Nebraska and the 1955 Dodge had an Illinois license on it. He brought both cars with him when he moved to Nebraska in 1964. He was driving neither car. He was driving a 1961 Chrysler for his personal use. The defendant himself stated that he planned on moving the vehicles out into the country. The police observation of the cars continued for a period of over 2 months, from October 16, 1969, until the middle of December 1969. Defendant refused to start the vehicles, giving as an excuse that he did not have a battery. The vehicles remained in the same location during the period of observation. The Dodge had no front seat, inside it was a small cultivator type garden tractor and four old tires, and it bore an out-of-state license plate. An anchor line ran from a clothesline post on the defendant's lot into the 1955 Dodge, apparently attached to the steering wheel. The wire attached to the Dodge was for the purpose of securing a clothesline pole in use by Mrs. Radcliff, the defendant's wife. The DeSoto contained no license plates on it at all.

A contention is made that the evidence is insufficient to sustain the conviction and this is based primarily on the question that the term "nonoperational" as used in the ordinance is unconstitutional, vague, indefinite, and uncertain. We do not discuss this question in the abstract. No question of constitutionality is present before us as we pointed out. The question of whether the term "nonoperating" was properly submitted to the jury is answered by the giving by the court of instruction No. 9 as heretofore recited. We observe further that the court in another instruction cautioned the jury that the word "immediately" did not mean at once or instantaneously, but was to be construed as within such

time as would appear reasonable to an ordinary or prudent person under the circumstances shown to exist. This language is almost identical to the defendant's requested instruction No. 2.

The court gave the above-mentioned instructions pursuant to the pertinent section of the Lincoln Municipal Code, section 10.30.040 (being a subsection of ordinance No. 8664) stating in substance as follows: "No person in charge or control of any property * * * shall allow any partially dismantled, *nonoperating*, wrecked, junked, or discarded vehicle to remain on such property longer than thirty days; * * *." (Emphasis supplied.)

We think it appears clear that the provisions of the subsection of the ordinance under which the defendant was prosecuted adequately inform the public and those persons governed by it as to the prohibitions contained therein, and that the court's instructions spell out a precise and meaningful definition of the term "nonoperating." It is clear, contrary to the defendant's contention, there is nothing in the subsection of the ordinance or the construction put on it by the trial court which would permit the jury to be misled into assuming that a vehicle must be in operation at all times under the terms of the ordinance.

From what we have said the evidence was ample to sustain the verdict of the jury and to find, under the definition of "nonoperating" given by the court, that the defendant was in violation of the ordinance as construed by the court. Assuming that the defendant's testimony was in conflict with what has been recited herein, the question of guilt or innocence in a criminal case is one to be determined by the jury, and it is the jury's function to pass on the credibility of witnesses and to weigh the evidence; and a jury verdict will not be disturbed unless clearly wrong, or the result of passion or prejudice. State v. Bundy, 181 Neb. 160, 147 N. W. 2d 500; Beranek v. Petracek, 184 Neb. 516, 169 N. W. 2d 275.

It is contended that the photographs introduced in evidence so enflamed the passion and prejudice of the jury as to require reversal of the case. This is a misdemeanor case. It is difficult to imagine, considering the precise nature of the offense charged, a case in which photographs would be more relevant in aiding the jury in understanding the facts as testified to by the witnesses and in resolving the basic issues before it under the court's instructions. Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court and unless an abuse of discretion is shown, error may not be predicated thereon. Beranek v. Petracek, *supra*.

The judgments of the district court in both cases are correct and are affirmed.

AFFIRMED.

CLINTON, J., concurring.

This case points out an apparent anomaly and lack of logic in the case law of this state with reference to the circumstances under which this court and the district court may take judicial notice of municipal ordinances.

Where there is an *appeal from a municipal* court from a conviction for an ordinance violation we and the district court may take judicial notice of the ordinance for the purpose of determining defendant's guilt or innocence but not for the purpose of considering an attack on the constitutionality of the ordinance. We ought to adopt a rule that is logically consistent.

I concur in the result because it is not clear beyond a reasonable doubt that the ordinance in question is unconstitutional. Dwyer v. Omaha-Douglas Public Building Commission, *ante* p. 30, 195 N. W. 2d 236.

Nothing that is here said is intended in any way to refer to the usual rules requiring the pleading and proof of municipal ordinances in other situations.

JUDITH NEWTON, APPELLEE, V. WAYNE D. NEWTON, APPELLANT.

196 N. W. 2d 116

Filed March 31, 1972. No. 38135.

1. **Divorce: Trial: Appeal and Error.** A divorce action is for trial de novo in this court. However, we cannot ignore the fact that the trial court had an opportunity to observe the parties.
2. **Divorce: Alimony: Trial: Appeal and Error.** A judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.
3. **Divorce: Alimony: Property.** The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into its determination.

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed.

Ryan & Scoville, Robert G. Scoville, and P. F. Verzani, for appellant.

Olds & Reed, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and CLINTON, JJ.

SPENCER, J.

In this divorce action by Judith Newton, plaintiff, against Wayne D. Newton, defendant, the appeal is predicated on the sole fact that plaintiff was given all of the property acquired while the parties lived together, as well as $1,800 alimony, payable $50 a month.

The marriage of the parties was of 5 years duration. During that time, plaintiff contributed substantially more to the support and maintenance of the parties than the defendant. Defendant issued several insufficient fund checks which plaintiff made good. The property of the parties, which had not been repossessed by creditors, consisted of a 1969 Mercury, a color television set, and other household goods, subject to an encumbrance of $1,999.50. These were assigned to the plaintiff. The

defendant acquired a 1970 automobile and a color television set after the separation. These were encumbered for $3,880. Defendant also had a diamond ring purchased during the marriage for $372.30, supposedly for the plaintiff, but of which she had no knowledge and which was never given to her. There is strong inference in the testimony that the defendant was interested in another woman.

Considering the encumbrance on the property transferred, it seems evident that the $1,800 alimony was intended to help plaintiff pay off the encumbrance.

A divorce action is for trial de novo in this court. However, we cannot ignore the fact that the trial court had an opportunity to observe the parties. Dodendorf v. Dodendorf, 186 Neb. 144, 181 N. W. 2d 438.

We have said that the judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown. Passmore v. Passmore, 144 Neb. 775, 14 N. W. 2d 670.

In Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173, we held the amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into its determination.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE, V. LAWRENCE D. LESSERT, APPELLANT.
196 N. W. 2d 166

Filed March 31, 1972. No. 38154.

1. **Administrative Law: Motor Vehicles.** The Director of Motor Vehicles acts ministerially in revoking a driver's license for point violations under sections 39-7,129 and 39-7,130, R. R. S. 1943.
2. **Administrative Law: Motor Vehicles: Evidence: Trial: Appeal and Error.** On an appeal to the district court from an order of the Director of Motor Vehicles revoking a driver's license for

point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at the evidentiary hearing and the necessary foundational facts must support the validity of the order of revocation.

3. **Trial: Judgments: Res Judicata.** Under the rule of res judicata, the conclusiveness of a prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in the final judgment, whether raised or not.
4. **Constitutional Law: Ordinances: Statutes: Courts.** Ordinances and statutes are presumed to be constitutional. Unconstitutionality must be clearly established and courts will not pass on a question of constitutionality if the issue may be disposed of on other grounds.
5. **Constitutional Law: Ordinances: Statutes: Trial: Motor Vehicles.** Unless a particular traffic ordinance or statute has been judicially declared unconstitutional, a motorist convicted of a violation of that ordinance or statute cannot challenge its constitutionality in a collateral proceeding to revoke his driver's license under the point system provided by sections 39-7,128 through 39-7,130, R. R. S. 1943.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Laurice M. Margheim and Bump & Bump, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The Department of Motor Vehicles revoked the driver's license of the plaintiff, Lawrence D. Lessert, on November 25, 1970. The basis for the revocation was the accumulation of 12 or more points for traffic violations under the provisions of sections 39-7,128 and 39-7,129, R. R. S. 1943. The plaintiff appealed to the district court and was granted a stay of revocation. Thereafter the district court found generally for the Department of Motor Vehicles, denied plaintiff's claims for relief,

and dismissed the action. We affirm.

On November 21, 1970, the plaintiff was convicted of careless driving under an ordinance of the City of Gordon, Nebraska. The plaintiff pleaded no contest to the charge nor did he take any direct appeal from the conviction. The conviction of November 21 resulted in a 4-point assessment. When added to plaintiff's previous convictions, this resulted in an accumulation of 13 points within a 2-year period. The Department of Motor Vehicles revoked the driver's license of plaintiff on November 25, 1970, and notification of the revocation was received by the plaintiff on November 30, 1970. The district court stayed the order of revocation and it remains suspended.

The plaintiff's appeal rests on the contention that the November 21 conviction was void because it was based on an ordinance which was unconstitutionally vague. He also asserts that he was denied procedural due process required by Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90, because of the lack of notice or hearing prior to the order of revocation by the Department of Motor Vehicles. He also contends that the scope of review in the district court is impermissibly restricted.

This court has very recently considered the due process issues under the point system statutes as affected by Bell v. Burson and determined them adversely to the plaintiff. See Stauffer v. Weedlun, *ante* p. 105, 195 N. W. 2d 218. That case specifically held that the Director of Motor Vehicles acts ministerially in revoking a driver's license under the point system and that the appeal procedures provided under section 39-7,130 and section 60-420, R. R. S. 1943, contemplate a full evidentiary hearing which meets the due process requirements of both the federal and state Constitutions.

The plaintiff indirectly asserts also that Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17, may be construed as limiting the hearing on an appeal to the district court

to an error proceeding strictly confined to a review of the records of the Director of Motor Vehicles. Such an interpretation would restrict judicial review to the sole issue of whether the records of the Director sustain his final order. We think it clear that this was not the legislative intent and that conclusion is now reinforced and compelled by Bell v. Burson, *supra*. In Stauffer v. Weedlun, *supra*, we indicated that completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at the evidentiary hearing provided for in the district court de novo review of the order revoking a driver's license. We now specifically affirm that holding. The necessary foundational facts must support the validity of the order of revocation. To the extent that Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17, may be in conflict, it is overruled. We point out also that the notice and hearing available to a motorist in connection with the trial and appeal of each conviction which may contribute to an ultimate point system revocation of his driver's license is an obvious and integral part of constitutional due process.

Fundamentally, plaintiff's appeal rests on the contention that the city ordinance of Gordon under which he was convicted on November 21, 1970, is unconstitutionally vague. That issue was not raised in the city court of Gordon, and there was no appeal from that conviction. The claim of unconstitutionality rests on the assertion that the ordinance was in some respects similar to a state statute which was declared unconstitutional by this court. They were not the same. There is no evidence that any court anywhere has ever declared ordinance No. 259 of the City of Gordon or any identical statute or ordinance unconstitutional.

The plaintiff's theory of unconstitutionality by reason of resemblance or similarity is an application of the "guilt by association" technique. It runs aground for several reasons. The issue of constitutionality becomes

res judicata because the constitutionality of the ordinance was an integral part of the judgment of the city court of Gordon when it convicted the plaintiff of a violation of ordinance No. 259. See Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119. In that case, this court determined that a failure to raise an issue of constitutionality in the trial court in effect waived any claimed defense subsequently on that ground. This court said: "The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein." The judgment of conviction here was not only not void, it was not even voidable.

Plaintiff's theory also founders under the well-established rule that ordinances and statutes are presumed to be constitutional. Unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality if the issue may be disposed of on other grounds. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397; Norlanco, Inc. v. County of Madison, *supra*.

Unless a particular traffic ordinance or statute has been judicially declared unconstitutional, a motorist convicted of a violation of that ordinance or statute cannot challenge its constitutionality in a collateral proceeding to revoke his driver's license under the point system provided by sections 39-7,128 through 39-7,130, R. R. S. 1943.

The determination of the district court was correct and is affirmed.

AFFIRMED.

PATRICIA E. FINK, APPELLANT, V. DONALD K. MEISTER ET AL., APPELLEES.

196 N. W. 2d 122

Filed March 31, 1972. No. 38156.

1. **Negligence: Motor Vehicles.** Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights.
2. ———: ———. Exceptions to the general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision is negligent as a matter of law embrace those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Robert R. Gibson, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This action arises out of an automobile accident. The trial court dismissed the action at the close of the plaintiff's evidence. The sole question before us is whether the plaintiff's evidence presented a question for the jury.

The accident happened at about 9:15 p. m., on January 6, 1970, on State Highway No. 50 approximately 3.4 miles south of Syracuse, Nebraska. It was a dark night but the weather was clear. The surface of the highway was dry.

The highway at that point runs straight north and south and is a 2-lane highway paved with concrete, 22 feet wide. There was some snow on the shoulders of the highway and there were piles or ridges of snow

near the ditch formed by snow which had been removed from the highway.

The defendant, David Meister, had been driving a 1967 Chevrolet automobile owned by his father, Donald K. Meister, south on Highway No. 50. He was in the process of making a U-turn on the highway when his automobile stalled. The record is not clear as to the exact position of the Meister automobile at the time of the accident, but apparently it extended across parts of both lanes and was headed somewhat to the northeast. There is no evidence as to why the automobile stalled; how long it had remained in that position; or whether any efforts were made to remove it from the traveled portion of the highway. The specifications of negligence alleged against the defendants were failure to keep a proper lookout; failure to maintain reasonable control; and turning from a direct course upon a highway when the movement could not be made with reasonable safety.

The plaintiff, Patricia E. Fink, was driving her 1963 Dodge automobile south on Highway No. 50 at about 60 miles per hour. The headlights on her automobile were turned on but the evidence does not show whether they were on high beam. The plaintiff was not wearing glasses at the time of the accident although she is nearsighted and her driver's license was then restricted to require glasses while driving.

The plaintiff testified that as she came over a hill she saw something in the road in front of her; the defendant's automobile seemed to be only 2 to 4 car lengths away; she told her sister who was riding in the rear seat to hit the floor; the collision occurred; and the car went through the ditch and then stopped.

The impact occurred in the west or southbound lane of the highway. The left front part of the plaintiff's automobile struck the left rear fender of the Meister automobile. After the impact the plaintiff's automobile entered the ditch on the west side of the highway,

struck a mailbox and telephone pole, and traveled approximately 310 feet through the snow before coming to rest. There were no skid marks, and the evidence indicates that the plaintiff did not apply her brakes before the impact.

The accident was investigated by Charles L. Griffith, a state patrolman. He testified that the impact area was located in the southbound lane, 500 to 600 feet south of the crest of the hill. The photographs which are in evidence corroborate his testimony in this regard.

Lester Feurer was the first person to arrive after the collision. The plaintiff had passed Feurer about ½ mile south of Syracuse, Nebraska. Feurer was then traveling about 50 miles per hour. Feurer stopped when he noticed some movement in the highway approximately 100 yards in front of him. This proved to be one of the passengers from the Meister automobile who was then 10 to 15 yards north of the Meister automobile and waving his arms to stop traffic.

Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Bartosh v. Schlautman, 181 Neb. 130, 147 N. W. 2d 492. The rule is not applicable where the object struck could not ordinarily be observed by the exercise of ordinary care in time to avoid a collision or reasonable minds might differ as to whether the motorist was exercising due care under the circumstances.

The plaintiff argues that the rule should not be applicable in this case because the color of the Meister automobile was such that it tended to blend in with the pavement. The record does not show the color of the Meister automobile and the photographs which are in evidence do not support this contention. There is nothing in the record to avoid the application of the rule. If the plaintiff had maintained a proper lookout and

control of her automboile the accident would not have happened.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES HENRY MATHEWS, JR., APPELLANT.
196 N. W. 2d 162

Filed March 31, 1972. No. 38226.

Criminal Law: Sentences: Homicide. A sentence of not less than 4 nor more than 7 years for manslaughter is not excessive.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Clayton H. Shrout of Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, James Henry Mathews, Jr., is appealing from a sentence of not less than 4 nor more than 7 years in the Nebraska Penal and Correctional Complex on a conviction for manslaughter.

The only question presented is the excessiveness of the sentence. We have reviewed the record and the presentence report and conclude that a sentence of not less than 4 nor more than 7 years, which is well within the statutory range for manslaughter, is not excessive.

Judgment affirmed.

AFFIRMED.

WILMER G. JOHNSON, APPELLEE, V. HAHN BROTHERS CONSTRUCTION, INC., A CORPORATION, APPELLANT.

196 N. W. 2d 109

Filed March 31, 1972. No. 38284.

1. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.
2. **Workmen's Compensation: Master and Servant: Evidence.** The test usually employed in this state to determine whether the relationship of master and servant exists is whether the alleged employer has the control of the workman and of the details, mode, and manner of doing the work.
3. **Workmen's Compensation: Words and Phrases.** The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident.
4. **Workmen's Compensation: Evidence.** Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
5. **Workmen's Compensation: Master and Servant: Evidence.** In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.
6. **Workmen's Compensation: Trial: Intoxicating Liquors.** In a workmen's compensation case the burden of proof on the defense of intoxication is on the employer.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Pilcher, Howard & Dustin, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Kermit A. Brashear, II, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant, Hahn Brothers Construction, Inc., appeals from a workmen's compensation award made to the plaintiff by the district court for Douglas County, Nebraska, which followed an appeal to and trial de novo in that court after a denial of recovery by a single judge of the Workmen's Compensation Court.

On this appeal the following three assignments of error are made, viz., the district court erred in finding: (1) That a contract of hire existed which gave rise to an employee-employer relationship between the parties; (2) that the plaintiff was acting in the course of his employment at the time of his injury; and (3) that the injuries arose out of the employment. Included within the above assignment is the contention that the plaintiff's injuries were caused by his being in a state of intoxication at the time. We affirm the judgment of the district court.

There are some substantial conflicts in the evidence presented to the district court on the basis of which it made its findings. In the case of Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285 (1971), this court recently called attention to the provisions of section 48-185, R. R. S. 1943, pertaining to review by this court of judgments of the district court in workmen's compensation cases, and said: "We therefore hold that on appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. We also hold that upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record." So far as is pertinent to this case the relevant portions of section 48-185, R. R. S. 1943, are: "A judgment, order, or award of the district court may be modified

or set aside only upon the grounds that . . . (3) the findings of fact are not supported by the evidence as disclosed by the record and, if so found, the cause shall be considered de novo upon the record."

We accordingly have reviewed the record here to determine whether the findings of fact are supported by the record. After such review we cannot say that the district court's findings are not supported by the evidence.

We briefly summarize the record. It establishes without dispute that on the evening of February 10, 1970, the plaintiff, Johnson, a bricklayer, met Harry Hahn, president and manager of the defendant, at the Omaha Bricklayer's Union Hall, where Hahn had gone for the apparent purpose of attempting to employ a bricklayer. Johnson's desire for employment was there made known to him. At that time Hahn told Johnson to report at the defendant's work site near 114th and Maple Streets in Omaha, Nebraska, at 8 o'clock a.m. the following morning.

There is substantial conflict in the testimony as to some of what occurred the following morning. Both Hahn and Johnson agree that Johnson reported at the site about an hour late. Johnson's testimony was that he reported on time at a site which he thought was the defendant's project. After waiting for quite some time and after no one showed up, he telephoned one Kisicki, a union representative through whom he had met Hahn the previous evening, and obtained information from him as to another possible place of employment. When leaving this first site to go to the other location Johnson stated he discovered he had been at 108th Street instead of 114th Street and he then proceeded to the defendant's construction site. Kisicki verified the telephone conversation and stated he had received it before 9 o'clock a.m.

Johnson testified that when he reached the defendant's work site he met Harry Hahn and attempted to

explain to him why he was late and was told by Hahn to report to Helmut Hahn, the foreman at the project; and that he then went over to the scaffolding where Helmut was working and started to climb it to talk to Helmut in order to get instructions as to where he was to work.

It is undisputed that he fell about 12 feet from the scaffolding at that time and before he reached the platform where Helmut was working. He there suffered the injuries which give rise to this litigation.

Hahn's testimony was that when Johnson arrived he was intoxicated, he stumbled several times, and he talked incoherently; that Hahn then told Johnson he could not go to work that morning and he sent Johnson home; and that Johnson had taken his tools out of the car, but put them back when he was told he could not go to work. Hahn then started to leave but observed Johnson crossing the street to the construction site and as Johnson did so he stumbled several times.

Homer Smith, an employee of the defendant who was about 20 or 30 feet away when the conversation between Hahn and Johnson took place, testified he heard Hahn tell Johnson in a loud voice to put his tools away, that he was not going to work that day, and also that Johnson at that time put the tools back in the car. Johnson did not remember whether he had taken the tools out of the car or not.

Helmut testified that he saw Johnson when Johnson's head came over the scaffold and Helmut shouted: " 'Look out, Bill.' " Then he testified: ". . . away he went." No one present including Johnson could testify as to the cause of the fall. There was no communication from Johnson to Helmut except that Helmut testified that before Johnson began the climb he repeated one or more times: " 'Helmut, I did a stupid thing.' "

With reference to the issue of intoxication the only testimony in addition to that of Hahn was Johnson's denial that he had consumed any alcoholic beverage that

morning; Kisicki's testimony that the telephone conversation with Johnson was normal in all respects; and the testimony of Johnson's former wife, a licensed practical nurse at the hospital where Johnson was taken after his injury, who testified that she helped undress him and smelled no alcohol on his breath. Homer Smith did not testify on the issue of intoxication and neither did Helmut.

Hahn testified further that following the accident he locked Johnson's car so that the tools would not be stolen and that he took the key to the hospital and gave it to the former Mrs. Johnson. Mrs. Johnson testified that when she thanked Hahn for the key and locking the car he stated: " 'It's just part of my job as his employer.' " She also testified that he said: " 'Don't worry about anything. We have insurance that will cover all of this.' " Hahn denied making these last two statements.

Evidence was introduced to establish that it was the usual thing for a bricklayer reporting for work for the first time to go to the foreman for assignment. Helmut testified that it was his duty to assign workmen to their place of work. Hahn testified that only he could hire and fire workmen.

It clearly appears that there is in the record reasonable competent evidence to support the district court's findings. On the issue of the employee-employer relationship the test "usually invoked in this state is whether the alleged employer has the control of the workman and of the details, mode and manner of doing the work." Williams v. City of Wymore, 138 Neb. 256, 292 N. W. 726. Without dispute, Johnson was told by Hahn on the evening prior to the injuries to report for work the following morning. If Johnson's version is to be believed then when he reached the work site he was told by Hahn to report to the foreman for assignment. This evidence is clearly sufficient to establish a contract of hire and control in the employer.

On the issue of whether the injury arose out of and in the course of employment this court has said the words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident. Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103. Also: "Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved." Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410. " 'In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.' " Simon v. Standard Oil Co., 150 Neb. 799, 36 N. W. 2d 102.

The evidence without dispute supports a finding that Johnson was on the work premises at the time of his injury; there is reasonable competent evidence to support a finding that at the time of his injury he was in the act of reporting to the foreman for the purpose of obtaining his work assignment. This brings him within the ambit of the rules just stated. Cases similar in principle to this one are: Fidelity & Casualty Co. v. Kennard, 162 Neb. 220, 75 N. W. 2d 553, where a woman employee of a hotel slipped and suffered injury just as she was arriving at the outside of the hotel door to report for duty, but before she had actually undertaken any work; and McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456, where an employee, leaving the premises of her employer in the usual and customary way after her work was ended, slipped and fell outside the building where she worked but while still on the grounds of her employer.

Whether Johnson was intoxicated at the time of his injury was a disputed question of fact. We need not decide whether the evidence is sufficient to support a finding that intoxication was the cause of his injury. The district court by its findings that the injuries arose out of and in the course of the employment has determined the defense of intoxication favorably to Johnson. The burden of proof on this defense is on the employer. §§ 48-107, 48-127, and 48-151 (7), R. R. S. 1943; Parson v. Murphy, 101 Neb. 542, 163 N. W. 847, overruled on other grounds in Meyer v. Nielsen Chevrolet Co., 137 Neb. 6, 287 N. W. 849.

The judgment of the district court awarding compensation and medical expense to the plaintiff is affirmed. The plaintiff is awarded an attorney's fee of $750 for services of his attorney in this court.

AFFIRMED.

KENNETH WULF, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLANT.
196 N. W. 164

Filed March 31, 1972. No. 38377.

1. **Statutes.** All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
2. **Appeal and Error: Judgments.** In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
3. **Appeal and Error: Motions, Rules, and Orders: Limitations, Statute of: Trial.** An order entered denying a plea of the statute of limitations, after a separate hearing on that issue, is not a final or appealable order.

Appeal from the district court for Nuckolls County: ORVILLE COADY, Judge. On motion to dismiss appeal. Dismissed without prejudice.

Luebs, Tracy, Huebner & Dowding, James A. Beltzer, and E. Steven Leininger, for appellant.

Downing & Downing, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action on an insurance policy brought to recover windstorm damages. As a defense, defendant pleaded the statute of limitations and a separate trial was requested on that issue as provided for in section 25-221, R. S. Supp., 1971. The trial court resolved the issue in favor of plaintiff and defendant appeals without awaiting trial of other issues or the entry of final judgment.

The case is now before us on plaintiff's motion to dismiss the appeal grounded on the fact that a final judgment or determination of the case has not been entered. We sustain the motion.

The statute above referred to provides: "If the issue raised by the statute of limitations is finally determined in favor of the plaintiff the remaining issues shall then be tried. If the issue raised by the statute of limitations is finally determined in favor of the defendant the action or actions barred by the statute of limitations shall be dismissed." Defendant contends that the words "finally determined" import such a final determination of the issue presented on the statute of limitations that an immediate appeal is required if the right to a determination of the issue in the Supreme Court is to be preserved. We do not believe that this is the legislative intent. The statute itself indicates that if the defendant's plea is upheld, a further *order of dismissal* must be entered. This indicates the determination of the issue is interlocutory in nature and not to be considered as a final order warranting an appeal.

We have repeatedly held that: "All statutes relating

to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision." State ex rel. Retchless v. Cook, 181 Neb. 863, 152 N. W. 2d 23.

Section 25-1911, R. R. S. 1943, provides for appeal *only* on "judgment rendered or final order made." "In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed." Busboom v. Gregory, 179 Neb. 254, 137 N. W. 2d 825. Section 25-1911, R. R. S. 1943, has not been amended and the two statutes must be construed together and reconciled if possible. In so doing, it seems clear that section 25-221, R. S. Supp., 1971, intends that an order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order and that any error in the ruling made may be presented in an appeal taken after final disposition of the case. It is in the same relative position as is faced when the court overrules a demurrer, a plea in abatement, a motion to amend, or a motion to dismiss.

The defendant's appeal is dismissed without prejudice.

DISMISSED WITHOUT PREJUDICE.

IN RE APPLICATION OF WALTER A. OHMART, JR., ET AL. WALTER A. OHMART, JR., ET AL., APPELLEES, V. S. E. DENNIS ET AL., APPELLANTS.

196 N. W. 2d 181

Filed April 7, 1972. No. 38133.

1. **Administrative Law: Time: Motions, Rules, and Orders.** The statutory requirement that the State Oil and Gas Conservation Commission enter its order within 30 days after hearing is directory, not mandatory.

2. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render judgment without affecting their interest.
3. **Administrative Law: Judgments.** The preclusive effect of an administrative decision depends upon many factors.
4. **Administrative Law: Oil and Gas: States: United States: Property.** State law applies to leasehold interests under the Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears.
5. ———: ———: ———: ———: ———. A favorable determination by the Secretary of the Interior is essential under the Mineral Leasing Act for Acquired Lands to inclusion of federal lands with non-federal lands in a State pooling order.
6. **Administrative Law: Oil and Gas: States: United States: Time: Property.** The State Oil and Gas Conservation Commission possesses power in a pooling order concerning federal and non-federal lands to make the order retroactive to the date of first production.

Appeal from the district court for Scotts Bluff County: TED R. FIEDLER, Judge. Affirmed.

Lyman & Meister and Howard P. Olsen, for appellant.

Van Steenberg, Winner & Brower, for appellee Ohmart.

Shino Kashiwa, Richard A. Dier, Robert Becker, Jacques B. Gelin, Larry G. Gutterridge, and V. McDonald, for appellee United States of America.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

On appeal from the State Oil and Gas Conservation Commission the district court pooled interests in a 1/16th section, approximately 40 acres, of oil-producing land. The interests were held by S. E. Dennis, and his lessee, Banner Oil Company, and the United States of America, and its lessee, Walter A. Ohmart, Jr.

Dennis and Banner appeal from district court. They assert five errors: (1) The pooling order of the commission from which they appealed to district court was void in that more than the 30 days allowed by statute

had elapsed between submission and decision of the controversy; (2) an indispensable party received no notification respecting the proceeding; (3) a mineral lease from the United States to Walter A. Ohmart, Jr., without competitive bidding was void; (4) a judgment of dismissal by the district court in a prior proceeding precluded the present claim of the United States and Ohmart for compulsory pooling; and (5) the United States and Ohmart in justice and equity possessed no right to share in production prior to the date they applied to the commission in this proceeding for a pooling order.

The United States in 1924 and 1927 acquired a fee simple absolute title from William Hartley to 7.71 per cent of the land in the spacing unit for location of wells. The tract was governed by the Mineral Leasing Act for Acquired Lands, now 30 U. S. C., §§ 351 to 359 (1970). On May 24, 1963, Banner commenced drilling a well on the acreage leased from Dennis. On June 20 it reported the completion of a producing oil and gas well, Dennis No. 1, on the leasehold acreage at a depth of 5,082 feet on June 5. Production began June 6. Dennis No. 1 stopped producing in May 1970. Banner then drilled Dennis No. 2 which was producing from October 1970 at least to December 1, 1970, the date of trial in district court.

More than 30 days elapsed between submission of the controversy to the commission and the entry of the commission order. The Legislature required the commission to enter its order within 30 days after the hearing. § 57-911(6), R. R. S. 1943. The subsection also authorized the commission to act on its own motion. The Legislature provided for the appeal to the district court which was to hold a trial de novo and independently to determine issues of fact and conclusions of law. See § 57-913(1), R. R. S. 1943. The 30-day requirement is directory, a rule of practice, and not mandatory. The delay did not constitute prejudicial error.

The indispensable party is said to be Gering-Fort

Laramie Irrigation District which received a quitclaim deed, dated December 1, 1932, from Hartley and wife to approximately 1.24 acres which was to form part of the spacing unit designated by the commission in 1959 for location of wells. Dennis testified the deed related to an easement that the district had abandoned, no one having used it for the past 10 or 12 years. His petition on appeal alleged that he and Nina Dennis owned the entire 1/16th section and that he and Banner were the only owners of any oil or gas leasehold, mineral or royalty interest in the 1/16th section.

Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render a final decree without affecting their interests. See Cunningham v. Brewer, 144 Neb. 218, 16 N. W. 2d 533 (1944) (supplemental opinion). The testimony of Dennis and the nature of the deed lead us to conclude that the district was not an indispensable party. See Smith v. Berberich, 168 Neb. 142, 95 N. W. 2d 325 (1959).

The alleged invalidity of the lease to Ohmart rested mainly on the assertion that the tract lay within a known geologic structure. Under such circumstance the law required competitive bidding. See 30 U. S. C., §§ 226(b), 351, and 352 (1970). Dennis and Banner unsuccessfully litigated the validity of the lease in intermediate administrative proceedings within the Department of the Interior. They failed to perfect an appeal to the Secretary of the Interior who dismissed the appeal on February 28, 1966. See 43 C. F. R., § 1840.0-7 and former 43 C. F. R., § 1844.3.

The United States presses claim preclusion on the validity of its lease. The law is not settled, especially when an administrative body made the first decision. The preclusive effect of an administrative decision depends upon many factors. It is important that the fact-finding process of the administrative body approximate that of a court, that the body observe fair standards of

evidence, that the facts be adjudicative, and that the process not deprive a party of his right to a jury trial. Those criteria are not exclusive, but they assist us in outlining the applicability of preclusion. See, 2 Davis, Administrative Law, §§ 18.01, 18.03, 18.08, and 18.12, pp. 545 to 547, 557 to 568, 597 to 605, and 625 to 628 (1958); Vestal, Res Judicata/Preclusion, V-223 to V-225 (1969). The administrative decision against Dennis and Banner precluded them from challenging the validity of the lease in this proceeding. See, generally, Henriques, "The Impact of Recent Decisions and Administrative Procedures of the Department of the Interior on Oil and Gas Leasing by the Bureau of Land Management," 14 Rocky Mt. Min. L. Inst. 33 (1968).

The claim preclusion asserted by Dennis and Banner grew out of a prior application by Ohmart to pool these interests. The commission on March 17, 1964, ordered compulsory pooling effective April 10, 1964. Dennis and Banner appealed to district court. The United States under Title 28 U. S. C., § 2410 (1969), moved to dismiss the Department of the Interior for lack of jurisdiction over the person and the subject matter. The Secretary of the Interior had not determined that such pooling would be in the public interest. Dennis and Banner then moved for summary judgment. The district court on August 8, 1966, found that neither it nor the commission had acquired jurisdiction over the United States. It accordingly dismissed Ohmart's application and vacated the order of the commission. The brief of counsel for the United States offers no clue to the reason for the position of the Secretary of the Interior, and we discover none in inspecting an unnecessarily voluminous record.

Congress possesses power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. United States Constitution, Art. IV, § 3, para. 2. The police power of the State extends over federal lands in the ab-

sence of a preempting federal interest. See Texas Oil & Gas Corp. v. Philipps Petroleum Co., 277 F. Supp., 366 (D. C., W. D. Okla., 1967), affirmed, 406 F. 2d 1303 (10th Cir., 1969). State law applies to leasehold interests like that of Ohmart under the Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. See Wallis v. Pan American Petroleum Corp., 384 U. S. 63, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966).

Much language in the federal statutes tends to point to the absence of any federal control in the presence of a conservation act like that of Nebraska. Without specifying the signs we conclude that a favorable determination by the Secretary of the Interior is essential to inclusion of federal lands with non-federal lands in a state pooling order. See, Title 30, U. S. C., §§ 226(j), 351 to 359 (1971); Texas Oil & Gas Corp. v. Phillips Petroleum Co., *supra;* cf. Wallis v. Pan American Petroleum Corp., *supra.* It follows that the judgment of the district court in the first proceeding did not preclude the United States or Ohmart from applying for the pooling order under review.

The district court ordered the pooling respecting production retroactive to June 5, 1963. It reserved for later hearing, however, issues concerning costs of drilling completion and of operating wells, and allocation of operating, drilling, and completion expenses.

The Legislature has empowered the Oil and Gas Conservation Commission to suspend the operation of the conservation act to federal lands in certain situations. The power is subject to the requirement that conservation and prevention of waste be accomplished. See § 57-920, R. R. S. 1943. The definition of waste embraces abuse of a correlative right resulting in an owner in the pool producing more than his just and equitable share of the oil from the pool. § 57-903(1) (c), R. R. S. 1943. See, also, § 57-909, R. R. S. 1943. The opposition of the United States in the prior proceeding confounds us, for

even a temporary national policy against pooling seems doubtful.

Assuming an analogy to a carried-owner's share of cost, we see an arguable advantage to the United States and Ohmart in the delay, although pooling is ordinarily a low-risk enterprise. The advantage may be lessened, perhaps offset, by allowance of a cost item for risk of capital. See, §§ 57-910.03(5) (c) and 57-910.10, R. R. S. 1943; Smith, "The Kansas Unitization Statute; Part II," 17 Kan. L. Rev. 133, 145 (1968); Meyers and Williams, "Petroleum Conservation in Ohio," 26 Ohio St. L. J. 591, 622 (1965). A review of the fairness of an order relating to shares of production but not costs is difficult. Notwithstanding strong doubts on the equity of retroactivity, we affirm the judgment of the district court.

AFFIRMED.

CLINTON, J., dissenting in part.

For the reasons set forth in my dissenting opinion in Farmers Irr. Dist. v. Schumacher, 187 Neb. 825, 194 N. W. 2d 788, I dissent from that part of the opinion approving the retroactivity of the commission order and the complete disregard of the statutory requirement of the establishment of a spacing unit prior to pooling and the disregard of the necessity of compliance with commission Rule 338 requiring notice and hearing to establish a spacing unit.

NEWTON, J., dissenting.

I respectfully dissent. Under the criteria laid down in Farmers Irr. Dist. v. Schumacher, 187 Neb. 825, 194 N. W. 2d 788, the Oil and Gas Conservation Commission order should not be retroactive. Appellees voluntarily withdrew from the first proceedings instituted to obtain a pooling order. They should not now be permitted recovery of oil produced prior to the institution of the second proceeding now on appeal to this court.

CITY OF PARKVIEW, STATE OF NEBRASKA, A CITY OF THE SECOND CLASS, ET AL., APPELLANTS, V. CITY OF GRAND ISLAND, STATE OF NEBRASKA, A CITY OF THE FIRST CLASS, ET AL., APPELLEES.

196 N. W. 2d 197

Filed April 7, 1972. No. 38137.

1. **Trial: Statutes: Evidence.** The burden is on one who attacks a statute valid on its face to prove facts to establish its invalidity.
2. **Annexation: Municipal Corporations: Statutes.** The requirement in section 16-122, R. S. Supp., 1969, that the annexing city have "sewer treatment facilities" with capacity to serve the city annexed, was intended to insure that the residents of the annexed city would be able to receive sewage treatment service from the annexing city.
3. **Annexation: Municipal Corporations: Administrative Law.** A city of the first class is not required to obtain a recommendation from the planning commission before proceeding with annexation matters.

Appeal from the district court for Hall County: S. S. SIDNER, Judge. Affirmed.

Sam Grimminger, John Wagoner, and Stephen T. McGill, Lyle E. Strom, William J. Brennan, Jr., and C. L. Robinson, of Fitzgerald, Brown, Leahy, McGill & Strom, for appellants.

Richard L. DeBacker, Duane A. Burns, and William Howland, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action to determine the validity of the annexation of the City of Parkview, Nebraska, by the City of Grand Island, Nebraska. The plaintiffs are the City of Parkview and officials and residents of that city. The defendants are the City of Grand Island, officials and residents of that city, and the Attorney General. The trial court found the annexation was valid. The plaintiffs have appealed.

Parkview is a city of the second class entirely surrounded by Grand Island, a city of the first class. The annexation was by ordinance pursuant to section 16-122, R. S. Supp., 1969. The statute authorizes a city of the first class to annex a city of the second class if certain conditions exist.

The plaintiffs contend that section 16-122, R. S. Supp., 1969, is unconstitutional because it is so limited in its application that it will never apply to any city or village other than Parkview. A similar argument was made and rejected in Campbell v. City of Lincoln, 182 Neb. 459, 155 N. W. 2d 444.

The statute is not invalid on its face. The class is not closed and it is possible that other first-class cities in Nebraska may eventually surround adjacent villages and cities of the second class which will be subject to annexation under the statute. So far as the record is concerned, there is no factual showing to support the plaintiffs' contention. The burden is on one who attacks a statute valid on its face to prove facts to establish its invalidity. Campbell v. City of Lincoln, *supra*.

One of the conditions specified in section 16-122, R. S. Supp., 1969, is that the annexing city shall have "sewer treatment facilities" with capacity to serve the city annexed. The plaintiffs' principal contention in this case is that the sewer treatment facilities of the City of Grand Island did not have sufficient capacity to serve the City of Parkview on December 29, 1969, the date the annexation ordinance was enacted.

The record shows that Grand Island has a modern sewage treatment plant which was completed in October 1965. The plant is described as a complete mixing activated sludge plant. It was designed to receive and treat all of the sewage, both domestic and industrial, originating in the City of Grand Island.

Much of the record consists of testimony concerning the "design capacity" of the plant as compared to its operating experience. There is evidence that the plant

can treat satisfactorily a volume of sewage far in excess of its design capacity. However, it has been necessary frequently to discharge partially treated sewage into the outfall ditch in order to reduce a temporary condition of excess activated sludge in the final clarifiers. Apparently, this condition results when a large volume of sewage, especially grease, is received in a short time from the Swift & Company packing plant nearby. The plaintiffs argue that this condition, termed "overloading," establishes that Grand Island did not have sewer treatment facilities with capacity to serve Parkview.

The purpose of the statutory provision is to insure that, if Parkview is annexed, its residents will be able to receive sewage treatment service from Grand Island. The test is whether there are facilities available to serve the area that is to be annexed. The record shows there are existing mains which can be extended into the annexed area to collect the sewage from Parkview and convey it to the treatment plant. The estimated additional sewage from Parkview which would be received at the treatment plant would be around 1 percent of the plant's present volume or capacity. The expert witnesses called by the defendants testified the plant facilities were adequate to treat the additional sewage that would be received from Parkview.

The additional sewage would be but a very small fraction of the hourly flow received at the plant. It would be such a small part of the volume received by the Grand Island plant, it would have no appreciable effect upon the operation of the plant. Under these circumstances, we think the condition of the statute is satisfied and the record supports a finding that Grand Island has sewer treatment facilities with capacity to serve Parkview.

The plaintiffs further contend that the annexation is invalid because Grand Island did not obtain a prior recommedation from the regional planning commission for Hall County, Nebraska. The regional planning com-

mission is an advisory body established to assist Hall County and the municipalities in Hall County in planning matters.

Section 18-1306, R. R. S. 1943, provides that a municipal governing body shall not take action on matters relating to "the comprehensive development plan, capital improvements, building codes, subdivision development, or zoning" until it has received the recommendation of the planning commission. There is no requirement that a recommendation be obtained in regard to annexation matters.

The judgment of the district court is affirmed.

AFFIRMED.

JAMES N. WRIGHT, APPELLANT, V. ARTHUR F. HAFFKE, DOING BUSINESS AS WEST LAKE GROCERY STORE, APPELLEE.
196 N. W. 2d 176

Filed April 7, 1972. No. 38150.

1. **Appeal and Error: Trial: Evidence.** A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.
2. ———: ———: ———. In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof.
3. **Criminal Law: Conspiracy: Evidence: Trial.** A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.
4. **Criminal Law: Weapons and Firearms.** Ordinarily, a firearm may be used if reasonably necessary to prevent the commission of a felony or to arrest a felon after a felony has been committed.
5. **Criminal Law: Weapons and Firearms: Trial: Evidence: Instructions.** When a firearm is used, the question always is whether the force used exceeded permissible limits and is a question for the jury under proper instructions.

6. **Appeal and Error: Trial: Instructions.** **Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available.**

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Matthews, Kelley, Cannon & Carpenter, for appellant.

Thomas A. Walsh of Boland, Mullin & Walsh, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This action involves personal injuries inflicted by a gunshot. The jury returned a verdict for the defendant. Plaintiff perfected this appeal. We affirm.

Plaintiff and an individual later identified as Evans entered the store of the defendant, Arthur F. Haffke, at the same time. Plaintiff was wearing a black jacket and Evans an off-white trench coat. One of them asked, "Where's the milk," and was directed to the northwest corner of the store. When the question was asked they were right next to each other. They both immediately headed to the northwest corner. Defendant did not know either man but assumed they were together. He was suspicious of them and secured a gun he had handy and placed it in his pocket. Defendant watched them in a mirror and saw the men conversing back and forth at the dairy box. The defendant signalled his son Warren, who was at the meat counter, to watch also. The two men came back to the checkout stand together. There is a dispute in the evidence as to which one had a carton of milk. Defendant testified it was Evans; plaintiff insists it was he. One of them set the milk down and asked for cigarettes. Defendant placed the cigarettes on the counter and opened the cash register, then was pushed

on the shoulder and knocked off balance into the cigarette case. He then noticed two hands going into the cash register. One of the hands in the cash register had a light cover, the other a black cover. As defendant turned around, he pulled his gun and fired a shot. The whole incident happened very fast.

As the defendant pulled his gun, the men were turning south toward the door. Plaintiff had moved from 5 to 7 feet from the counter and was about 3 feet from the door. Evans was to the side and slightly behind him. Defendant's first shot hit the plaintiff in the back. A second shot was fired at Evans but missed. Evans slipped and fell after the second shot was fired, but got up and ran rapidly toward the west. The entrance and exit to the store was through two doors, side by side, one opening in, the other opening out. The testimony is that Evans headed for the door opening out; the plaintiff for the door opening in. Defendant did not realize at the time he shot that plaintiff was heading for the door which opened in.

The only currency found inside the building was a bloody $10 bill, which plaintiff testified was his and which was near his hand. Defendant testified that this bill had been pushed behind a broom near some shelving at the entrance to the incoming door, where plaintiff fell. Another $10 bill was found under some broken glass outside the door. The first policeman on the scene testified that plaintiff gave his name as "James Green," and that he saw plaintiff pushing the bloody $10 bill behind the broom previously identified.

Plaintiff sets out nine specific assignments of error, and for his tenth assignment alleges seven errors involving instructions. We discuss only those which we deem merit consideration. Plaintiff's principal assignment of error, his first, pertains to the overruling of his motions for a directed verdict. Plaintiff predicates this assignment on his contentions: (1) That the crime was not his but that of Evans; (2) that he could not escape

because he was headed for the door which would not open from the inside; and (3) that the force used by defendant as a matter of law was unduly excessive to protect or recapture property.

As to plaintiff's contention (1), the following principles of law are applicable: "A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record." Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124.

"In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof." Vacanti v. Montes, 180 Neb. 232, 142 N. W. 2d 318.

"A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto." State v. Walker, 187 Neb. 482, 191 N. W. 2d 817.

The evidence, while conflicting, was ample to permit the jury to determine that plaintiff was a participant in the robbery, and no purpose will be served by further reviewing the 737 pages of the bill of exceptions herein.

We may summarily dispose of plaintiff's contention (2) by the observation that the jury undoubtedly found that a reasonable man in defendant's predicament would have acted as he did. Defendant testified that he did not realize at the time he shot that plaintiff was headed for the door which opened in. The door, however, immediately adjoined the one opening out, and the action occurred so fast that Haffke did not have time to weigh the various possibilities. The jury undoubtedly found the shooting to be an instantaneous reaction to the assault and robbery.

Plaintiff's contention (3) is the crucial question in

this action. Was the situation such that the defendant was privileged to use a gun to protect or recapture his property? On the record, defendant had been assaulted and the perpetration of a robbery was in progress. Money had been taken and defendant's instantaneous reaction was to stop the felons and retain it. Paraphrasing the Restatement rule, use of force is privileged when property is tortiously taken from the owner's possession and it reasonably appears that the felon is about to remove the property from the owner's premises. Restatement, Torts 2d, § 101 (1) (a) and (b), p. 175.

A person may use reasonable force in defense of his property. The issue under consideration is whether the force defendant used exceeded permissible limits and subjected him to civil liability. It is plaintiff's contention that the use of a firearm in view of the circumstances herein constituted the use of unreasonable force as a matter of law. With this we do not agree. We do not believe that a person must docilely submit to robbery and the spiriting away of his property by a felon. To hold otherwise would seriously hamper the right of law-abiding individuals to peacefully enjoy their property; would encourage felons in the pursuit of their nefarious activities; and would make a farce of our criminal law. Ordinarily, a firearm may be used if reasonably necessary to prevent the commission of a felony or to arrest a felon after a felony has been committed. We do not disagree with plaintiff that the law generally places a higher value upon human life than mere rights of property. When a firearm is used, the question always is whether the force used exceeded permissible limits and is a question for the jury under proper instructions.

In the early case of Fosbinder v. Svitak (1884), 16 Neb. 499, 20 N. W. 866, which involved a firearm, this court held: "A person may, with reasonable force, defend his property or premises, as well as his person, when invaded, and the fact that an injury is inflicted

upon the invading or attacking party will not make the resisting party liable for damages resulting from such injury, if inflicted in the reasonable defense of one's house, lands, or goods."

There is a conflict among the various jurisdictions as to whether one may resort to a firearm to prevent a theft of property. See Annotation, 100 A. L. R. 2d 1012. The conflict, however, is in most instances one of degree. For minor thefts the use of a firearm would not be justified, but for more serious felonies, such as robbery, the use may be justified. In this case, the shooting occurred after the participants had committed an assault and while they were attempting to commit a robbery. Defendant owed plaintiff no duty of affirmative care, and had the right to resist the attempted robbery and to use whatever means lay within his power, necessary to that end, even to the extent of using a firearm to retain his property. It was for the jury to determine, however, whether the plaintiff was actually engaged in an attempt to commit a robbery or, if not, whether defendant had reasonable grounds to so believe.

Plaintiff's second assignment of error is that the court erred in overruling his motion for a mistrial. Defendant called the police file clerk to the witness stand. He elicited the fact that she was employed by the Omaha police department; that she had charge of certain records; that she was subpoenaed to bring two of those records with her; and that they referred to two different individuals. The record then continues: "Q. Mrs. Stone, do the records which you have brought with you today indicate the names and the addresses of the individuals to which these records pertain? A. Yes. Q. Do you have with you a record for James — MR. CANNON: Just a moment, I object to any reference to these records at all at this time, Your Honor. THE COURT: Sustained."

Plaintiff's motion for a mistrial is based on his premise that defendant was attempting to show plaintiff had a

police record. Defendant's offer of proof is directed to the fact that he was only attempting to show both plaintiff and Evans at the time in question lived at the same address, and he had no intention of introducing the records in evidence. The trial court sustained the objection to the testimony, overruled the motion for a mistrial, and at the request of the plaintiff gave the following written instruction: "You are instructed to disregard the testimony of Mrs. Ida Stone of the Omaha Police Department, and you are admonished not to draw any inferences or conclusions from the fact that she was called as a witness." Additionally, the court instructed the jury as follows: "You are instructed that this is a civil action for damages only. You are advised that there are no criminal charges pending, either against the plaintiff or the defendant and that no criminal responsibility can possibly flow from your verdict for or against either party hereto, and your deliberations should not be affected in any way by concern that such results might follow. You are to determine and consider only the issues in this case as explained to you in these instructions."

We do not agree with plaintiff that the testimony adduced was obviously prejudicial. The jury knew the police had been called and interviewed the plaintiff. It would also know the police would have some record of the robbery. Even though Mrs. Stone's testimony was withdrawn from the consideration of the jury by a specific instruction, if defendant's counsel had gone no further than to show that the address of both the plaintiff and Evans at the time of the robbery was the same but did not put the files in evidence, there could be no prejudice. The motion for a mistrial was properly overruled.

Plaintiff's third assignment of error relates to the sustaining of 14 different objections on cross-examination that the question does not reflect the evidence. In the only instance where there could be any possible doubt,

the question was rephrased and answered, so there could be no prejudice. Plaintiff's fourth assignment of error referred to other objections falling in the same category. The rulings in each instance were correct or nonprejudicial.

Plaintiff's fifth assignment of error complains of the sustaining of an objection to the reading of a newspaper article to defendant on cross-examination. From his offer of proof we assume plaintiff was attempting to impeach defendant's trial testimony. If so, he had not made a proper record for that purpose. The objection was properly sustained on the record.

The balance of plaintiff's assignments of error are clearly without sufficient merit to warrant a detailed discussion of them. As to the plaintiff's tenth objection involving instructions, the jury was properly instructed relative to plaintiff's theory of the case, as well as the defendant's. Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available. Beranek v. Petracek, 184 Neb. 516, 169 N. W. 2d 275.

Considered in the light of the above rule, plaintiff's seven specific assignments of error as to instructions are without merit.

For the reasons given, the judgment is affirmed.

AFFIRMED.

JOSEPH DEMONT, BY AND THROUGH HIS FATHER AND NEXT FRIEND, DONALD M. DEMONT, APPELLEE, V. STEVEN MATTSON ET AL., APPELLANTS.
196 N. W. 2d 190

Filed April 7, 1972. No. 38178.

1. **Trial: Negligence: Evidence: Motor Vehicles. An issue of gross negligence is for the jury if the evidence relating thereto is**

conflicting and from which reasonable minds might arrive at different conclusions.

2. ———: ———: ———: ———. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law.
3. ———: ———: ———: ———. More than one act of negligence may in combination amount to gross negligence under the guest statute and the several acts should be weighed as a whole.
4. ———: ———: ———: ———. Whether a particular act or omission may be termed gross depends upon all the facts and circumstances, including other negligent acts or omissions, which may affect the quality of the conduct in the particular case. What would amount to slight negligence under certain circumstances, might under different circumstances be gross negligence.
5. **Trial: Negligence: Motor Vehicles.** Where the head of a family owns or maintains a car for family use and a family member is using the car with the express or implied consent of the owner, the negligence of the family member driver is imputed to the head of the family.
6. **Trial: Assumption of Risk.** Where reasonable minds might differ as to whether a risk was assumed a jury question is presented.
7. **Trial: Negligence: Evidence: Motor Vehicles.** Before contributory negligence of a guest passenger presents a jury question there must be evidence that it proximately contributed to the accident and injuries.
8. **Trial: Instructions.** Instructions must be considered and construed together.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Harold W. Kauffman and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellants.

Warren C. Schrempp, J. William Gallup, and Richard J. Dinsmore of Schrempp & Bruckner, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Plaintiff Joseph Demont brought this action to re-

cover damages for personal injuries suffered on December 2, 1966, while a guest passenger in an automobile driven by the defendant Steven Mattson. The accident occurred about 10:30 p.m., on a road in Sarpy County, Nebraska, called Camp Gifford Road but known locally as Roller Coaster Road. It was alleged the accident and injuries were caused by the gross negligence of the defendant Steven Mattson. The defendant Harris Mattson is the father of Steven Mattson and it is alleged that the negligence of Steven is imputed to him by virtue of the family purpose doctrine. At the time of the accident Steven was 18 years of age and a senior in high school. The plaintiff was 15 years of age and a freshman in high school and had never driven a car. Three other boys were in the car, two age 15 and one age 13, and two of these testified in the case. The plaintiff occupied the front seat with Steven. The jury returned a verdict for the plaintiff and the defendants appeal.

The errors assigned on appeal involve the following issues: (1) Was the evidence sufficient to permit the submission to the jury of the question of Steven's gross negligence; (2) did Joseph as a matter of law assume the risk of injury; (3) was the trial court correct in not submitting to the jury the question of Joseph's contributory negligence; (4) was the trial court correct in imputing as a matter of law the negligence of Steven to Harris Mattson; and (5) were there errors in the instructions to the jury.

The main question presented is the sufficiency of the evidence to support a jury verdict of gross negligence on the part of Steven. This court has always recognized that the statutory concept of gross negligence can be expressed only in abstract terms. Boismier v. Maragues, 176 Neb. 547, 126 N. W. 2d 844. It has not always defined gross negligence as that term is used in section 39-740, R. R. S. 1943, in the same way. Gross negligence within the statute is not necessarily wanton, willful, or intentional disregard for a guest's safety. Sterns

v. Hellerich, 130 Neb. 251, 264 N. W. 677. It has been said that the term means "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others." Larson v. Storm, 137 Neb. 420, 289 N. W. 792. The definition which has now been settled upon and approved by the court in Nebraska Jury Instructions is: " 'Gross negligence' within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty." NJI No. 7.51. See, also, Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20. Where several acts of negligence are supported by the evidence "no one act is to be segregated and weighed separately to determine whether or not it constituted gross negligence. Instead the several acts are to be considered as a whole." NJI No. 7.51. See, also, Olson v. Shellington, *supra;* Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184; Carley v. Meinke, 181 Neb. 648, 150 N. W. 2d 256.

This court has frequently reiterated in slightly varying language that whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. Boismier v. Maragues, *supra.* In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury. Boismier v. Maragues, *supra;* Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483; Olson v. Shellington, *supra.* Where evidence has been submitted to the jury and the guest plaintiff receives a verdict then this court in determining whether the evidence supports the finding must resolve the evidence most favorably to the existence of gross negligence and when the facts are thus determined the inquiry whether they support the finding is one of law. Olson v. Shellington, *supra;* Paxton v. Nichols, *supra;* Holliday v. Patchen, 164 Neb. 53, 81

N. W. 2d 593. Whether given acts of negligence are gross or slight may depend upon the circumstances under which the acts or omissions occur. Paxton v. Nichols, *supra*. In accordance with the last two cited principles we summarize the facts which the jury could have found resolving them in the light most favorable to the findings of gross negligence. When we do this we conclude that the minds of reasonable men might differ as to whether the facts constitute gross negligence and therefore we find as a matter of law that the jury question was made.

The jury could have found: The trip to Roller Coaster Road was suggested by Steven because "It was different." The road itself is just what the term suggests, very hilly, very winding, and narrow. It is completely unlighted and made darker by surrounding woods. Immediately adjacent to the road edges were embankments or ravines. Some of the curves are very sharp and the hills very steep. It would be difficult for two cars to pass on the road and in places impossible. The road is completely unmarked by traffic control signs. The surface of the road was dirt, gravel, and crushed rock and in places washboardy. The surface of the road afforded an unsuitable base for quick stopping. The driver's view ahead was at times severely restricted by the hills and curves. Steven had driven over this road two or three times in daylight hours previously and was familiar with the general nature and condition of the road, but did not know it well enough to remember where all the curves were and had no very good idea how far ahead the beam of his headlights extended. The accident occurred after the trip down the road had proceeded for about a mile when Steven failed to see a curve and the car left the road, went into a ravine, and hit an embankment. The last 1,000 feet or 2 blocks preceeding the curve where the accident happened the road was straight but downhill. When the car passed the crest of the hill it was going 35 to 40 miles per hour and the

speed increased to about 50 miles per hour as it went down the hill. As it proceeded down the hill, "Stewart in the back seat told Steve that he had better slow down, that there was a curve up ahead." Steven replied he "had been down there before and that he knew what he was doing." The above exchange occurred about half way down the hill or 1 block to 500 feet before the curve. Steven later applied his brakes but not in time to make the curve. He had no real knowledge of how far he could see ahead but the headlights shone ahead for 150 to 200 feet. Pictures of the damaged vehicle were presented in evidence. These show an impact of severe degree. The medical evidence of the plaintiff's injuries also gave some indication of the severity of the impact.

The trial court was correct in submitting to the jury the question whether Steven was guilty of gross negligence proximately causing the accident and the plaintiff's injuries.

We now discuss the matter of the plaintiff's possible assumption of risk and contributory negligence. The evidence showed that the plaintiff had been on the road on one previous occasion and that the reason for going there on the night the accident occurred was because it presented a challenging and thrilling ride. In the light of the plaintiff's age and the fact that he did not drive a car we do not believe it can be said as a matter of law that the plaintiff "assumed the risk." The court properly submitted this question to the jury.

The court did not err in refusing to submit the question of whether the plaintiff was guilty of contributory negligence proximately causing his injuries. A passenger is not required to maintain the same lookout as the driver. There is nothing in the evidence to show that he was made aware of the particular danger before Steven was aware of it or that anything he could have done would or might have been effective in preventing the accident.

The evidence showed that the automobile in question was owned by the defendant Harris Mattson and his wife, that Steven resided with them and was a student, and that he was using the car on this occasion with his father's specific permission. There was no contradicting evidence on these points. The father is the head of the household as a matter of law. The trial court correctly instructed the jury that Steven's gross negligence if any was imputable to Harris Mattson. Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682; Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725.

The defendants assert that instruction No. 9 was erroneous and that it conflicted with instruction No. 8 and would confuse the jury. We find no error in these instructions and they are in fact consistent with the principles we previously set forth in connection with the gross negligence issue. Instruction No. 8 is the standard gross negligence instruction. NJI No. 7.51. Instruction No. 9 is a stock instruction, NJI No. 2.03-I, on burden of proof in which the court inserted the adjective gross before the word negligence and the adverb grossly before the word negligent, and also in the instruction described the allegations of negligence which it found supported by the proof. The defendants' special complaint is that part of the instruction is "grossly negligent in *one or more* of the following particulars." (Emphasis supplied.) They claim it permits a finding of gross negligence on one of the alleged items alone. This is true but not erroneous. Instructions Nos. 8 and 9 must be construed together and with the other instructions. Whether gross negligence exists depends upon the facts and circumstances. Boismier v. Maragues, *supra*. One act of negligence may constitute gross negligence depending upon the circumstances. Some of the circumstances which may be considered are other negligent acts. Paxton v. Nichols, *supra*.

The defendants complain of instructions Nos. 13, 14, and 15. These are NJI Nos. 7.02, 7.03, and the first

paragraph of 7.03A absent the words "and he is negligent if he fails to do so." There was no error in these instructions. The jury was still required to find Steven grossly negligent. Instructions must be construed together.

There being no error in the record, the judgment is affirmed.

AFFIRMED.

CHARLES EUGENE BREED, APPELLEE, V. INTERSTATE GLASS COMPANY AND NATIONAL UNION INSURANCE COMPANIES, APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH GLASS CONTRACTORS, INC., AND EMPLOYERS COMMERCIAL UNION INSURANCE GROUP, APPELLEES AND CROSS-APPELLANTS.

196 N. W. 2d 169

Filed April 7, 1972. No. 38189.

1. **Workmen's Compensation.** Where there have been two injuries to an employee, the question of whether the disability sustained by him should be attributable to the first or to the second depends on whether or not the disability sustained was caused by the original injury or by an independent intervening cause.
2. ———. Where the first injury is not the proximate cause of the disability, the second injury constitutes an independent intervening cause.
3. **Workmen's Compensation: Trial: Evidence.** The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee, arising out of and in the course of his employment.

Appeal from the district court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed in part, and in part reversed and remanded with directions.

Haney, Wintroub & Haney, for appellants.

Charles E. Kirchner and Oliver O. Over, Jr., for appellee Breed.

Cassem, Tierney, Adams & Henatsch, for appellees Glass Contractors, Inc., et al.

Heard before WHITE, C. J., SPENCER, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

The issue involved in this appeal is whether apportionment of workmen's compensation benefits between successive employers is permitted in Nebraska. There is now no Nebraska statute or case authorizing or providing any formula for the apportionment of compensation benefits. The compensation judge and the district court apportioned the benefits between the two employers. Interstate Glass Company perfected this appeal. We reverse in part.

The plaintiff injured his back while working for Interstate Glass Company in 1964. He was paid some benefits at that time. On April 20, 1969, plaintiff again injured his back while working for Glass Contractors, Inc. The second injury was an aggravation of the first. Apportionment has been permitted in a few jurisdictions.

This is essentially a case of first impression in Nebraska. The applicable rule in the past is well delineated in Towner v. Western Contracting Corp. (1957), 164 Neb. 235, 82 N. W. 2d 253, and Snowardt v. City of Kimball (1962), 174 Neb. 294, 117 N. W. 2d 543. The rule deduced from these cases is that where there have been two injuries to an employee, the question of whether the disability sustained by him should be attributable to the first or to the second depends on whether or not the disability sustained was caused by the original injury or by an independent intervening cause. Where the first injury is not the proximate cause of the disability, the second injury constitutes an independent intervening cause.

The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained

by the employee, arising out of and in the course of his employment. In this case, plaintiff's disability, as distinguished from his physical condition, resulted from the second injury. Consequently, the first injury was not the proximate cause of the disability. The second injury therefore constitutes an independent intervening cause, and the judgment as to Interstate Glass Company and National Union Insurance Companies should be reversed and the action dismissed.

The other question presented by Charles Eugene Breed, plaintiff, is the allowance of attorneys' fees in the district court, which had also been apportioned between the two employers. Section 48-125, R. R. S. 1943, provides, so far as material herein: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court. In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

Plaintiff *pro se* filed the action against both employers in the workmen's compensation court and did not secure counsel until the appeal was taken to the district court. The appeals herein were perfected by Interstate. Glass Contractors' Inc., offered no evidence in the compensation court, and in the action on appeal to the district court alleged that the award was correct and should be affirmed. The sole subject of its cross-appeal herein is the assessment of an attorneys' fee against it in the district court. On the record herein, the allowance of attorney's fees was improper and is reversed. In all other respects, the judgment for the plaintiff is affirmed

against Glass Contractors, Inc., and Employers Commercial Union Insurance Group.

Judgment reversed and dismissed as to Interstate Glass Company and National Union Insurance Companies. Allowance of attorneys' fees reversed. Judgment affirmed in all other respects against Glass Contractors, Inc., and Employers Commercial Union Insurance Group.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DON L. MEADOWS, APPELLANT.
196 N. W. 2d 171

Filed April 7, 1972. No. 38254.

1. **Trial: Continuances.** The granting of a continuance is a matter within the sound discretion of the trial judge and a denial of a motion for a continuance will not be disturbed in the absence of an abuse of discretion.
2. **Criminal Law: Trial: Evidence.** The problem concerning the admissibility of evidence of other offenses is a special aspect of the broad general problem of relevancy, and generally the test of admissibility of such evidence is whether the evidence is relevant and material to any issue on the trial, or whether it fairly tends to prove the particular offense charged or an essential element thereof.

Appeal from the district court for Pierce County: MERRITT C. WARREN, Judge. Affirmed.

Thomas H. DeLay and Deutsch & Hagen, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Appellant, Don L. Meadows, was convicted and sen-

tenced for assault with intent to inflict great bodily harm and carrying concealed weapons. Appellant contended he was actually assaulted by the arresting officer, Robert G. Block, of the Plainview police department, and any resistance he made was in defense of his person. We affirm.

Appellant had several brushes with Block on occasions prior to March 20, 1971, when the present offenses were committed. Block testified that about 2 a.m. on the day in question he drove past appellant's home. A block past the home he noticed headlights coming behind him. He speeded up and the other vehicle did likewise. Block recognized appellant's automobile. When Block approached the main highway he saw a state trooper and blinked his lights to attract the trooper's attention. When he reached the highway he slammed on his brakes and ran back to the appellant's car. Block testified that the appellant raised a shotgun and said " 'You are all done,' " or " 'This is all for you.' " Block grabbed the barrel of the shotgun; drew his own gun, a .45-caliber pistol; fired a shot in the air; and then hit the appellant on the head with the gun. The trooper arrived after the shot. They subdued appellant and searched him. They discovered two bayonets in the pockets of his field jacket. Neither of these bayonets was visible before the search. Appellant's shotgun was loaded with 12-gauge slugs.

Appellant testified that when he was stopped, Block said " 'You're not going to follow me tonight,' " then flipped the latch on his pistol, grabbed the barrel of a shotgun which appellant was attempting to push down under the front dash, hit the appellant across the side of the head with the .45, fired a round into the air, then placed the muzzle of the .45 into appellant's throat and stated, " 'You move, you * * *, and I'll shoot you.' "

The trooper testified that he heard the gun shot; came to the scene where officer Block and the defendant were stopped; drew his pistol; ordered appellant out of his

car; frisked him; and found two bayonets in the coat pockets of the field jacket worn by appellant. Appellant was then arrested and charged with assault with intent to inflict great bodily harm and carrying concealed weapons.

Appellant in the cross-examination of Block developed the fact that Block had stopped appellant on three occasions prior to March 20, 1971. On redirect examination it was revealed that two of these encounters with appellant had resulted in arrests and convictions for misdemeanors. Appellant testified that he had been harassed and followed by Block on a number of occasions including December 14, 1970, January 1, 1971, and January 10, 1971. He testified that on the first occasion Block pointed a carbine at him when checking his driver's license; that Block would stop by the appellant's home and follow him; that he was in fear of Block; and on the morning of March 20, 1971, he was assaulted by officer Block.

Appellant alleges 11 assignments of error but does not discuss some of them in his brief. We refer only to those we deem merit discussion.

Appellant complains of the overruling of his motion for a continuance. This was made because the appellant was appealing the two misdemeanor convictions to the district court. These convictions arose out of encounters previously mentioned. This court has repeatedly stated that the granting of a continuance is a matter within the sound discretion of the trial judge and a denial of a motion for a continuance will not be disturbed in the absence of an abuse of discretion. See State v. Peterson, 183 Neb. 826, 164 N. W. 2d 649. The disposition of the misdemeanor charges was not material to the question of defendant's guilt or innocence. The State could not have introduced those convictions in the first instance for any purpose. The trial court did not abuse its discretion in overruling the motion for continuance.

Appellant argues that the court erred in overruling his objection to Block's testimony on redirect examination as to the misdemeanor convictions. Appellant in his cross-examination of Block opened up the subject in developing his defense of harassment. The issue for the prosecution then became whether on these prior occasions the officer had reasonable cause to believe appellant had violated the law. Even the dismissal of the convictions in the district court would not necessarily suggest that the officer did not have reasonable cause to believe that appellant had violated the law. The testimony complained of is as follows: "Q Was he arrested that time also? A Yes, sir. Q Have either one of those cases, has the trial been held on them? A Yes, sir. Q What was the outcome of them? MR. DELAY: I object to the question, incompetent, irrelevant, immaterial, calling for incompetent evidence. THE COURT: Overruled, you may answer. A Found guilty. Q (By Mr. Webster) On both occasions? A Yes, sir. Q What Court was that in? A County. Q In Pierce County? A Yes. MR. WEBSTER: That's all."

The problem concerning the admissibility of evidence of other offenses is a special aspect of the broad general problem of relevancy, and generally the test of admissibility of such evidence is whether the evidence is relevant and material to any issue on the trial, or whether it fairly tends to prove the particular offense charged or an essential element thereof. Here, the evidence could only be received for the purpose of indicating that Block had reasonable grounds for stopping the appellant and did not do so merely for the purposes of harassment. It was appellant and not the prosecution who injected the issues of the December 14, 1970, and January 1 and January 10, 1971, incidents into the case.

In the context in which this case was tried, no one could consider appellant's guilt or innocence of the offenses as having a bearing on his propensity or disposi-

tion to commit the crimes of assault and carrying concealed weapons. The real question in connection with these other occasions was whether Block had harassed the appellant to the point that appellant was put in fear of his life and believed it necessary to carry weapons for his own defense. In this context we find the evidence was admissible on the issue of harassment.

There is no question in our minds as to appellant's guilt. The evidence is undisputed that he was following Block's car at 2 o'clock in the morning, without any reasonable explanation for being on the streets of Plainview at that hour. Nor is there any reasonable explanation why appellant had a loaded shotgun in his car and two bayonets in the pockets of his field jacket. Appellant testified the gun and the bayonets were not in his car earlier in the evening. He put them there at approximately 1:30 that morning. The most plausible inference is that he was looking forward to a showdown with Block.

The last assignment we consider is appellant's complaint on the refusal of the trial judge to permit him to testify about an encounter with Block some 7 weeks after the incidents involved herein. This assignment is without merit. The reason the court permitted testimony about the previous encounters was that appellant was trying to convince the jury he was acting in self defense, and, because of the previous incidents, he had reason to be afraid of Block. Such justification is entirely lacking with respect to any incident taking place after the incidents resulting in the present criminal charges. This subsequent episode could have no relevance to the crimes of which appellant was convicted, and the objection to such evidence was properly sustained.

For the reasons given, the judgment is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the result only. The majority opinion

might be taken to approve the proof of convictions of crime by oral and hearsay testimony. I do not believe it should be so construed. Records of conviction may be proved only by the records themselves with proper foundation or certified copies as provided by statute. However, here there was no prejudicial error because the convictions were involved only collaterally (see McCormick on Evidence, § 200, p. 412), and because the appellant was later permitted to show, also by oral evidence, that the convictions were not final and were then pending on appeal.

The majority opinion speaks of the appellant's "defense" of harassment as related to the incidents of December 14, 1970, and January 1 and January 10, 1971. There was nothing in the incidents of those dates which would have justified the appellant in arming himself to the teeth and following Block. Likewise there was nothing in those incidents which would justify Block in harassing the appellant. Block's justification for stopping appellant on March 20 arose out of hearsay reports that appellant was out to get him. Apparently the reports had some foundation.

It seems apparent that both parties introduced evidence of the incidents of December 14, January 1, and January 10 for the purpose of supporting *the truth* of their respective versions of the alleged assaults of March 20, 1971, and for the purpose of attacking the emotional stability of the other. For the most part evidence of what was said and done on the prior occasions were simply self-serving declarations on behalf of each. While the incidents were relevant on the issue of truth telling, I seriously doubt they were competent and admissible for that purpose. For this reason the trial court was correct in keeping out the evidence of the subsequent incident. It too was designed only to support the appellant's version of the truth of the incident of March 20. Had proper objection been made the trial court would probably have kept out most of the extraneous

incidents save that pertaining to other threats which were claimed to have been made by the appellant.

McCOWN, J., dissenting.

The majority opinion approves the admission of oral testimony by a witness that defendant had been found guilty of other completely separate misdemeanors. The action is justified upon the ground that one of the defenses here was based on a claim of prior harassment by the arresting officer in the misdemeanor cases. The officer was also the intended victim of the assault here. He was also the witness who testified to the prior convictions. Apparently this method of establishing conviction of another crime by oral testimony was approved on the theory that it established the officer's reasonable cause to believe that the defendant was guilty of the misdemeanors.

As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. See State v. Casados, *ante* p. 91, 195 N. W. 2d 210. Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." Even in the case of a felony, the court is required to instruct that evidence of previous convictions can be considered only as affecting credibility. See Vanderpool v. State, 115 Neb. 94, 211 N. W. 605. NJI No. 14.62 is specifically to that effect. Neither that instruction nor anything similar to it was given here. It seems strange indeed, where a statute requires that proof of a felony conviction is only competent by establishing "the record thereof," that conviction of a misdemeanor which generally is not even admissible at all may be established by the hearsay testimony of an arresting officer.

While it may be true that the involvement of the misdemeanors was only collateral here, it is impossible to determine that there was no prejudicial error. The majority opinion as to evidence of other convictions

might be compared to establishing a new medical classification of partial pregnancy which is then declared not to be pregnancy because it is only termed partial. No such assumption should be indulged here.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. THUNDER HAWK, APPELLANT.
196 N. W. 2d 194

Filed April 7, 1972. No. 38262.

1. **Criminal Law: Right to Counsel.** In a criminal prosecution the right of an indigent to the assistance of counsel does not encompass an unbridled right to choose his counsel.
2. ———: ———. When a competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, his only alternative is to proceed pro se.
3. **Trial: Evidence.** Whenever the point is reached at which a trier of fact is being told that which it is entirely equipped to determine without a witness' aid, the testimony is superfluous.
4. **Appeal and Error: Sentences: Evidence.** This court may reduce a sentence when in its opinion the sentence is excessive, and it is under a duty to render such sentence against the accused as in its opinion may be warranted by the evidence.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Charles F. Fitzke and James T. Hansen, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury has found John B. Thunder Hawk guilty of assault with intent to commit rape. He appeals. Assignments of error relate in part to (1) the denial of a motion by Thunder Hawk for appointment of substitute counsel, (2) the admission of a lay opinion into

evidence, and (3) the sentence imposed by the court.

The evidence that Thunder Hawk assaulted his victim with intent to commit rape is overwhelming. Late at night on the occasion in question he ran his vehicle into a ditch. He subsequently stopped an automobile being operated on a dirt road by the victim, a college student and a stranger to Thunder Hawk. She was alone and homeward bound. He forced his way into her automobile and they began to struggle. He then drove her automobile into a nearby bean field and became mired down. The struggle continued in the car and then in the field. While the father of the victim was operating a pickup truck in a search, he found his daughter and Thunder Hawk. In the encounter the latter was struck many times with the fists of the father. The interval of fisticuffs was short, for the father quickly attended to his daughter whom he transported to the hospital. An officer of the State Patrol subsequently arrested Thunder Hawk.

At the scene of the assault in the field a patrol officer found a scrap of cloth. He testified over objection to "portions of what appeared to be pantyhose or similar material." In subsequent testimony on photographs of the scrap he referred to pantyhose. Both the part of the pantyhose taken home by the victim and the scrap were admitted into evidence. The officer possessed no expertise on pantyhose, stockings, or other cloths.

Thunder Hawk testified as follows. He had been intoxicated. He lost consciousness, with one exception, during a long period. The period began prior to the assault and ended subsequent to written admissions by him to a patrol officer. The one lucid interval during the period was recollection of blows struck by a man in a pickup truck.

After the preliminary hearing Thunder Hawk moved for discharge of his appointed counsel, the public defender, and for appointment of a designated lawyer. Among the alleged grounds were lack of confidence and

inadequate investigation in that the public defender had conferred with him only for 5 minutes. The motion was overruled.

In a criminal prosecution the right of an indigent to the assistance of counsel does not encompass an unbridled right to choose his counsel. When a competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, his only alternative is to proceed pro se. State v. Bratton, 187 Neb. 460, 191 N. W. 2d 612 (1971). See generally A. B. A., Standards Relating to Providing Defense Services, Approved Draft 1968, § 5.2, Commentary b, p. 48 (1967).

The ruling on the motion of Thunder Hawk was correct. The short visit with him was fully justified. Thunder Hawk with his assertion of loss of consciousness over the critical period of time could not help counsel much in an investigation. The public defender obtained an order for examination of Thunder Hawk by a psychiatrist to be chosen by the defense.

Respecting the nature of the scrap of cloth the testimony of the patrolman was that of a lay witness. Not only the scrap but also the pantyhose worn by the victim were in evidence. The jury possessed an equal opportunity of personal observation. Whenever the point is reached at which a trier of fact is being told that which it is entirely equipped to determine without a witness' aid, the testimony is superfluous. Sears v. Mid-City Motors, Inc., 179 Neb. 100, 136 N. W. 2d 428 (1965), quoting 7 Wigmore on Evidence, § 1918, p. 11 (3d Ed., 1940). See, also, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F. R. D. 315, Rule 701, at 402 (1971). Admission of the testimony in question was erroneous, but the error was harmless.

The statutory minimum and maximum periods of imprisonment for assault with intent to commit rape are 2 and 15 years. § 28-409, R. R. S. 1943. The court sen-

tenced Thunder Hawk to imprisonment for an indeterminate period of 13 to 15 years less credit for jail time.

Evidence pertaining to the sentence is summarized as follows. Thunder Hawk, age 24 at the time of the sentencing hearing in August 1971, had attended the Porcupine School on the Pine Ridge Reservation. His formal education ceased after the 8th grade. He was married and the father of a child 75 days old. A farm laborer, he was not steadily employed.

A psychiatrist examined Thunder Hawk in July 1971, to determine his mental condition at the time of the alleged offense. He elicited the following history. Thunder Hawk had served 2 months in the Marine Corps, receiving a general discharge. During his limited service he made a suicidal gesture by plunging into water on an obstacle course. He subsequently blacked out and struck his drill instructor, who was exerting pressure on him.

The psychiatrist concluded that Thunder Hawk's impulse control was fair but affected by immature thinking and social naivete. He diagnosed dissocial behavior, emphasizing the cultural, educational, and pecuniary handicaps in adjustment to adult life.

Thunder Hawk had no record of prior convictions. During the confinement in county jail, the sheriff named him a trusty. Thunder Hawk at no time violated that trust.

This court may reduce a sentence when in its opinion the sentence is excessive, and it is under a duty to render such sentence against the accused as in its opinion may be warranted by the evidence. See § 29-2308, R. R. S. 1943.

The sentence of Thunder Hawk is reduced to 5 years, less jail time. The judgment, so modified, is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissenting.

I dissent from that part of the opinion of the court which reduces the sentence of the accused. The offense

was one of extreme violence. I find no basis in the record for eliminating the indeterminate feature of the sentence or for reducing the upper limit fixed by the trial court.

CLINTON, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GARY DEAN BITTNER, APPELLANT.
196 N. W. 2d 186

Filed April 7, 1972. No. 38304.

1. **Constitutional Law: Witnesses: Evidence: Self-Incrimination.** The Constitutions of Nebraska and of the United States provide that no person shall be compelled to give evidence against himself of an incriminating nature.
2. **Statutes: Witnesses: Self-Incrimination.** By statute, a witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy.
3. **Courts: Witnesses: Self-Incrimination.** The trial court, in the exercise of a sound discretion, must determine whether a witness' claim of privilege is justifiable.
4. **Criminal Law: Trial: Witnesses: Evidence: Self-Incrimination.** The credibility of a witness in a criminal case cannot be impeached by showing that his reputation for morality is bad, but such an attack must be addressed directly to his reputation for truth and veracity.
5. ———: ———: ———: ———: ———. When chastity is not an issue, evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is inadmissible for the purpose of impeaching the witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for the purpose of impeachment by evidence as to specific acts or instances.
6. **Criminal Law: Trial: Witnesses: Constitutional Law.** The right to confrontation provided by the Sixth Amendment to the Constitution of the United States is not violated when a witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to a defendant's guilt or innocence.
7. **Criminal Law: Trial: Witnesses: Instructions.** Ordinarily the

uncorroborated testimony of an accomplice who has been guilty of a conscious falsehood may sustain a conviction if a proper cautionary instruction is given.

8. **Criminal Law: Sentences: Appeal and Error.** Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Beatty, Morgan & Vyhnalek, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

The defendant was convicted of possession of a forged instrument. He was sentenced to serve not less than 2 nor more than 4 years in the Nebraska Penal and Correctional Complex and to pay a fine of $250 and costs. On appeal defendant presents three assignments of error, namely: Prejudicial restriction of his right to cross-examine the State's principal witness; conviction on the uncorroborated testimony of an accomplice; and the imposition of an excessive sentence. We affirm the judgment of the district court.

The defendant and one Rachael Ann Williams had driven from Omaha, Nebraska, to North Platte, Nebraska, where she cashed one forged instrument and where they were apprehended when she tried to cash another. The witness pled guilty to a similar charge but had not been sentenced at the time of defendant's trial. She was represented, when testifying, by a court-appointed attorney and upon his advice, refused to answer certain questions propounded on cross-examination on the ground that the answers would tend to incriminate her. No possible prejudice appears except in regard to the question of whether the witness was a prostitute. Objection to the question and witness' claim to privilege

was based upon Article I, section 12, Constitution of Nebraska, and upon section 25-1210, R. R. S. 1943. Both provide that a witness cannot be required to incriminate himself and the cited statute further provides that a witness cannot be compelled to answer when to do so would "expose him to public ignominy." Although generally forbidden by city ordinance, to be a prostitute or to engage in prostitution does not constitute a crime under state or federal law. This being true, it is difficult to see how answering the question would tend to incriminate the witness unless she had been guilty of some sexual offense, such as adultery, where, in the event of prosecution, such an admission might be damaging. As usual in such cases, the record fails to throw any light on the situation of the witness in this respect. In Hoffman v. United States, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118, it is said: "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, * * * and to require him to answer if 'it clearly appears to the court that he is mistaken.'" It was further held that the guarantee against compulsory self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." On the record before us, this court cannot say that the trial court was guilty of an abuse of discretion. It is entirely possible that such an admission could constitute a link in a chain of evidence required to convict her of some other offense.

The courts are divided upon the question of whether or not impeachment on moral grounds is permissible. In State v. Cox (Mo.), 352 S. W. 2d 665, a prosecution for murder, defendant asked a prosecution witness if she was a prostitute and an objection to the question was sustained. The court stated: "The credibility of a witness in a criminal case cannot be impeached by showing that his reputation for morality is bad, but such

an attack must be addressed directly to his reputation for truth and veracity." Of similar import are People v. Vatek, 71 Cal. App. 453, 236 P. 163; People v. Brown, 136 Cal. App. 2d 244, 288 P. 2d 984; State v. Gress, 250 Minn. 337, 84 N. W. 2d 616; State v. Peele, 67 Wash. 2d 893, 410 P. 2d 599. Generally speaking Nebraska follows this rule and it has been promulgated by statute. See § 25-1210, R. R. S. 1943.

In Pricer v. Lincoln Gas & Electric Light Co., 111 Neb. 209, 196 N. W. 150, it was held: " 'When the matter sought to be elicited would tend to render him (the witness) criminally liable, or to expose him to public ignominy, he is not compelled to answer, * * *.' "

In Daggett v. State, 114 Neb. 238, 206 N. W. 735, it was held: "Evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is inadmissible for the purpose of impeaching the witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for the purpose of impeachment by evidence as to specific acts or instances."

In State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794, it was held: "Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded." See, also, Swogger v. State, 116 Neb. 563, 218 N. W. 416.

There is a recognized exception to the Nebraska rule in cases involving sexual offenses where chastity is an issue. See Redmon v. State, 150 Neb. 62, 33 N. W. 2d 349.

Defendant insists that his right to confrontation was denied by the restriction of cross-examination in the area above mentioned. We cannot agree. The restricted questioning dealt only with a collateral matter bearing solely on the credibility of the witness, not upon facts brought out on direct examination, and not on facts pertaining to the guilt or innocence of the de-

fendant. In United States v. Cardillo, 316 F. 2d 606 (2d Cir., 1963), and in Smith v. United States, 331 F. 2d 265 (8th Cir., 1964), cert. den., 379 U. S. 824, it is stated: "'* * * reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him."

From a practical standpoint, it is difficult to see how prejudice could result in the present instance.

Defendant protests that his conviction is dependent upon the uncorroborated evidence of an accomplice who had previously given false or contradictory statements. Examination of the statements previously given discloses a complete lack of any false or contradictory statement. The witness is corroborated in part. The evidence of others discloses that defendant was driving the automobile when a stop was made at a filling station and a forged money order cashed by the accomplice. Also, a stop was then made at a Safeway Store where an attempt was made to cash a second forged money order and on being refused, the accomplice ran to the automobile, spoke to the defendant, and he attempted to hastily drive away. The present rule in this state governing situations of this character may be found in Smith

v. State, 169 Neb. 199, 99 N. W. 2d 8, and Rains v. State, 173 Neb. 586, 114 N. W. 2d 399, cert. den., 371 U. S. 967, 83 S. Ct. 549, 9 L. Ed. 2d 538, wherein it is stated: " 'The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.' " See, also, Jahnke v. State, on rehearing, 68 Neb. 181, 104 N. W. 154. Such instruction was given.

In regard to the contention that the sentence is excessive, the record discloses that although this was defendant's first felony conviction, he had been convicted of a great many misdemeanors and had, on two occasions, spent quite a little time in the county jail. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion. See State v. Gamron, 186 Neb. 249, 182 N. W. 2d 425.

The judgment of the district court is affirmed.

AFFIRMED.

PAUL PHILLIPPE ET AL., APPELLANTS, V. ALVIN HORNS ET AL., APPELLEES.

196 N. W. 2d 382

Filed April 14, 1972. No. 38129.

1. **Deeds: Property: Boundaries: Parties.** Where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter.
2. **Deeds: Property: Boundaries.** Fixed monuments and surveys staked out on the ground control over field notes showing the courses, distances, and quantities; or a description of a survey in words; or a picturization of a survey in a plat.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Healey, Healey, Brown & Burchard, for appellants.

Wellensiek, Morrissey & Davis, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is a residential boundary line dispute. The district court found for the defendants, fixed the location of the boundary line, and dismissed plaintiffs' petition.

Williams Addition to Syracuse, Otoe County, Nebraska, was surveyed by the county surveyor in 1959, and dedicated in early 1960. The lots involved here are in Block 3 of that addition. The county surveyor at the time he surveyed and platted Williams Addition also staked out the lots, marking the corners with wooden stakes. Iron pipes were also driven in at the same locations as the wooden stakes. Thereafter the boundaries of particular lots were pointed out to prospective purchasers with reference to the iron pipes. C. R.

Williams was the common grantor who conveyed to both the plaintiffs and defendants. The plaintiffs purchased Lot 1 in September 1961, and Lot 2 in August of 1964. The defendants acquired Lot 4 in September 1963. Lot 4 was a triangular-shaped lot. Its easterly boundary was the westerly boundary of Lots 1 and 2. This line is the disputed boundary line.

The plaintiffs built their home on Lot 1 in 1961 or 1962. The defendants completed the construction of their home on Lot 4 in early 1964. In June 1964, the contractor for the defendants did some excavating and grading along the east boundary line of Lot 4. The lot corners were then staked. He used a string and excavated on the line between the stakes. The excavating came very close to a line of trees the plaintiffs had planted. The contractor had some conversations with the plaintiffs as to the boundary line and the plaintiffs then moved the trees several feet to the east. The defendants then erected a rock wall along the excavated line between Lot 2 and Lot 4.

There was no controversy until 1967 or 1968. In 1968, plaintiffs employed two surveyors who separately retraced the survey from the original plat. One testified that the boundary line was some 5 feet west of the stone wall erected by the defendants. The other found the line to be substantially the same and within 1 foot of that shown on the recorded plat. A third surveyor, Darrel W. Simonds, with the assistance of a contractor who had worked in the addition since 1961, made a survey in 1970. He located one stake set in concrete at the northwest corner of Lot 6. This surveyor also located an iron pipe at the southwest corner of Lot 3 and a 1¼ inch hole covered by a clay tile slab at the southeast corner of Lot 3. He also found an iron pipe at the northeast corner of Lot 2 and the southeast corner of Lot 1. Using these monuments and the lot line measurements and information given on the recorded plat, he then completed his survey. He determined

that the boundary line was 8.2 feet east of the boundary line as shown on the plat. He agreed that if reliance were placed solely on the plat without reference to the monuments he located, the other surveys would be substantially correct. His survey indicated that the entire block had been staked and located on the ground approximately 8.2 feet east of the location shown in the recorded plat.

The City of Syracuse and the Lincoln Telephone and Telegraph Company, using joint poles, set them in 1960 in Block 3 of Williams Addition. These poles were set on a north-south line between plaintiffs' and defendants' lots and in accordance with the lot stakes that were then present. The poles have not been moved since and they confirm the Simonds survey. The trial court, after viewing the premises, accepted this survey as the correct one and fixed the boundary line in accordance with it.

The plaintiffs assert that a survey based upon the original plat and survey establishes the boundary line as against miscellaneous stakes not shown to establish a consistent and accepted boundary line. The defendants assert that the original monuments fixed by the county surveyor during the survey and platting of an addition to a city will control the boundaries even though they are at a place different from that shown in the plat.

The difference is primarily in the interpretation of the facts. At this point it should be noted that the trial court found that the conveyances to the plaintiffs and defendants were from a common grantor and that the plaintiffs and defendants purchased their lots with reference to the boundary line as marked and staked on the ground by the common grantor and as surveyed and staked by the county surveyor; and that at the time of the purchases it was the intention of the common grantor and the grantees that such stakes marked the common boundary line of the lots on the ground purchased by

the plaintiffs and the defendants. That finding is supported by the evidence.

Where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter. See Thiel v. Damrau, 268 Wis. 76, 66 N. W. 2d 747. This principle was indirectly approved in Lunzmann v. Yost, 182 Neb. 101, 153 N. W. 2d 294, although in that case the facts did not support the application of the principle.

This court has consistently held that fixed monuments and surveys staked out on the ground control over field notes showing the courses, distances, and quantities; or a description of a survey in words; or a picturization of a survey in a plat. The general rule is: Since plats are merely a picturization of courses and distances, the statements as to conflicts between monuments and plats apply also to conflicts between the monuments marking a surveyed line and the description thereof in a course and distance description. The monuments prevail over calls for courses and distances. Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659.

The determination of the issues here rests primarily upon the facts. The trial court viewed the premises and saw and heard the witnesses. The record supports his determination. The judgment is affirmed.

AFFIRMED.

MIDWEST LUMBER COMPANY, APPELLANT, V. DWIGHT E. NELSON CONSTRUCTION COMPANY, APPELLEE.
196 N. W. 2d 377

Filed April 14, 1972. No. 38143.

1. **Contracts: Parties.** A contract should be so construed as to give effect to the intention of the parties rather than defeat the purpose for which it was executed.
2. **Contracts: Insurance: Buildings.** In the absence of some contractual provision to the contrary the risk of loss or damage by windstorm, fire, etc., to a new building in the course of construction is normally on the builder.
3. **Contracts: Insurance: Building: Parties.** A building contractor as well as the owner has an insurable interest in the building in the course of construction.
4. **Contracts; Insurance: Parties.** An owner who contracts to procure insurance to cover the contractor and fails to do so or who procures such insurance and fails to have the contractor named as an insured becomes the insurer of the contractor.
5. **Contracts: Insurance: Subrogation: Parties.** An insurer cannot recover by right of subrogation from his own insured nor can the rights of a subrogated insurer rise higher than the rights of its insured against the third party.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Kenneth Cobb and J. S. Berry, for appellant.

Knudsen, Berkheimer, Endacott & Beam and Larry D. Langdale, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from an order of the district court sustaining the motion of the defendant Dwight E. Nelson Construction Company for judgment on the pleadings and the subsequent order of dismissal of the petition of the plaintiff Midwest Lumber Company. We affirm. The parties hereafter will be referred to as contractor and owner respectively. They entered into a construction contract under the terms of which the contractor agreed

to construct three lumber storage buildings under what was essentially a cost plus contract with the owner furnishing most of the materials. Under the terms of the contract the owner agreed to pay the contractor for certain reimbursable items as defined in the contract plus an amount equal to 10 percent of the reimbursable costs. The present action is described as an action by the owner to recover damages alleged to have been sustained when some of the building framing blew down during the course of construction and had to be replaced. The owner in this action claims the damage was caused by the negligence of the contractor in not bracing the framing, but the owner appears also to rely upon a contractual provision as follows: "Contractor agrees to use his best skill and judgment in erecting such Buildings. . . ." It is uncertain whether the action sounds in contract or tort but that is immaterial in the view we take of the case. The amount sought to be recovered is $5,416.44. The admissions in the pleadings show and it is likewise admitted in this court that this is in fact a subrogation claim by the insurance carrier hereinafter referred to.

The contract contained the following provision: "Contractor shall provide public liability insurance which shall be a non-reimbursable item. *Builders risk or fire and extended insurance coverage shall be provided and paid for by the Owner.*" Emphasis supplied.) The answer of the contractor alleges and it is judicially admitted by failure to deny that the owner procured the required builders risk or fire and extended coverage insurance and has collected from the carrier the sum of $5,416.44. A copy of the "loan receipt" is included in the admissions. It appears that the contractor was not named as an insured in this policy.

The sole question involved is the construction of the contractual provision requiring builders risk or fire and extended coverage insurance to be paid for by the owner. Did the parties intend that the builders risk or

the fire and extended coverage insurance cover only the risks of the owner or of both the owner and the contractor? We conclude that the parties intended to cover the risks of both and therefore the owner cannot recover from the contractor because the risks of both contractor and owner were intended by the parties to the construction contract to be covered by insurance. In determining this intention a contractual provision must be interpreted in light of the other provisions of the contract, and the rights and liabilities which the law imposes upon the parties as a result of the contract. Contracts should be so construed as to give effect to the intention of the parties. Gallagher v. Vogel, 157 Neb. 670, 678, 61 N. W. 2d 245; General Motors Acceptance Corp. v. Blanco, 181 Neb. 562, 149 N. W. 2d 516; Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562.

The specific terms of the contract of insurance are not before us, but the undenied allegations of the defendant's answer show that this contract did cover at least the specific risks which in fact caused the loss and it is acknowledged by the parties in this court that a builders risk policy is the one involved. It is not necessary for us to know all the hazards insured against, but it is common knowledge of course that builders risk and fire and extended coverage insurance include much more than windstorm damage and also that a builders risk policy commonly covers material, normally the contractor's property, not yet incorporated in the building. In this case under the terms of the construction contract both the contractor and the owner were to furnish materials, but the only specific provision on the point was that the owner would furnish most of the materials.

In the absence of some contractual provision to the contrary the risk of loss by windstorm, fire, etc., to a new building in the course of construction is normally on the builder, that is, he is obligated to restore the

building damaged or detroyed. Annotation, Building Contract—Destruction, 53 A. L. R. 105; Board of Education v. Kane Acoustical Co., Inc., 51 N. J. Super. 319, 143 A. 2d 853. A building contractor who makes a contract to construct a building has during the course of construction an insurable interest in the building. Annotation, Insurance—Builder's Risk, 94 A. L. R. 2d 226, 234; German Fire Ins. Co. v. Thompson, 43 Kan. 567, 23 P. 608; Sammons & Bishop v. American Fire Ins. Co., 94 S. C. 366, 77 S. E. 1108. The owner, of course, also has an insurable interest in the building under construction. Lititz Mut. Ins. Co. v. Lengacher, 248 F. 2d 850; Annotation, Insurance—Builder's Risk, 94 A. L. R. 2d 227, 237. Both interests can be and sometimes are insured in the same policy. Annotation, Insurance—Builder's Risk, 94 A. L. R. 2d 229, 260. It is apparent therefore that when the parties entered into the contract both had interests to protect against loss. It is evident that if each was interested only in protecting himself from loss each could have purchased his own insurance and he need not have consulted the other about it. The reason for including a specific provision for "Builders risk or fire and extended coverage insurance . . . paid for by the Owner" could be only to protect the separate interest of both parties and to determine how the cost thereof was to be paid. Under the terms of this construction contract the cost of the insurance was to be paid by the owner rather than included in the costs of the contractor and then charged back to the owner as part of the contract price.

We now turn to the question of why the owner or his insurer cannot recover in this action. An owner who contracts to procure insurance to cover the contractor and fails to do so is the insurer of the contractor. Connor v. Thompson Constr. & Develop. Co. (Iowa), 166 N. W. 2d 109; Aetna Casualty & Surety Co. v. Hensgen, 22 Ohio St. 2d 83, 258 N. E. 2d 237. The failure of the owner to cause the contractor to be named as

an insured in accordance with the intent of the parties as is implicit in the construction contract, causes the owner to become the insurer of the contractor. Connor v. Thompson Constr. & Develop. Co., *supra;* Aetna Casualty & Surety Co. v. Hensgen, *supra.* The rights of a subrogated insurer can rise no higher than the rights of its insured against the third party. Board of Education v. Kane Acoustical Co., Inc., *supra;* Louisiana Fire Ins. Co. v. Royal Indemnity Co. (La. App.), 38 So. 2d 807; Connor v. Thompson Constr. & Develop. Co., *supra.* An insurer cannot recover by right of subrogation from his own insured. Connor v. Thompson Constr. & Develop. Co., *supra.*

The order of the district court is correct and is affirmed.

AFFIRMED.

IN RE ESTATE OF JOSEPH COOK, DECEASED.
FRANCIS B. HAIAR, APPELLANT, V. E. J. KESSLER, ADMINISTRATOR OF THE ESTATE OF JOSEPH COOK, DECEASED, APPELLEE.
196 N. W. 2d 380

Filed April 14, 1972. No. 38149.

1. **Statutes: Words and Phrases.** Referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent.
2. **Statutes: Actions: Torts: Time.** An amendment to the dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after the effective date of the amendment. The antecedent of the date of the amendment is occurrence of the tort, not commencement of the action or proceeding.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Robak & Geshell, for appellant.

Ray C. Simmons, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A petition on appeal against the estate of a deceased alleged negligent damage in a tractor-automobile collision at a controlled intersection. During the trial the district court dismissed the petition at the close of petitioner's case-in-chief. Petitioner appeals. He asserts that he satisfied the burden of producing evidence and that the court in excluding evidence misconstrued an amendment to the dead man's statute.

The intersection, located in the Village of Humphrey, was controlled by 4 stop signs, one at each corner. One street ran north-south, the other east-west. Each was approximately 28 feet wide and carried two-way traffic.

A witness heard the collision. She looked and saw petitioner Francis B. Haiar, fall from his tractor. She also saw a Chevrolet automobile owned by Joseph Cook, the deceased, move away from the tractor.

A village police officer found the back wheels of the tractor in a damaged condition on the terrace at the southeast corner of the intersection. The same day he interviewed Cook, age 81, at Cook's home. Cook admitted having run a stop sign, having cut a corner short, and having turned too quickly. The officer noted damage to the lamp on the left front fender of Cook's Chevrolet automobile.

The evidence is insufficient to imply (1) the existence or nonexistence of movement of the tractor or (2) the direction of movement of either vehicle. It did not satisfy the burden of Haiar to produce evidence.

The controversy over the meaning of the amendment to the dead man's statute resulted from these circumstances. Prior to 1969 this court had decided that a motor vehicle collision was a transaction within the meaning of the dead man's statute. See Bowers v. Maire, 179 Neb. 239, 137 N. W. 2d 796 (1965). In 1969

the Legislature enacted L.B. 377, which amended the statute to read: "No person having a direct legal interest in the result of any civil action or proceeding, other than those arising upon unintentional tort after the effective date (December 25, 1969) of this act . . . shall be permitted to testify . . .." § 25-1202, R. S. Supp., 1969; Laws 1969, c. 184, § 1, p. 776.

The collision between Haiar and Cook had occurred September 7, 1966. Haiar filed his claim against the estate on April 9, 1970. The district court construed the phrase "after December 25, 1969," to refer to occurrence of the tort. Haiar asserts that the phrase refers to commencement of the action or proceeding.

Referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent. 2 Sutherland, Statutory Construction, § 4921, p. 448 (3d Ed., 1943); Nebraska State Railway Commission v. Alfalfa Butter Co., 104 Neb. 797, 178 N. W. 766 (1920). A statutory amendment relating to procedure is ordinarily applicable to pending cases that have not been tried. Cf. Happy Hour, Inc. v. Nebraska Liquor Control Commission, 186 Neb. 533, 184 N. W. 2d 630 (1971).

We see no reason to adopt a construction contrary to syntax. The antecedent of the date of the amendment is occurrence of the unintentional tort, not commencement of the action or proceeding.

The district court construed the amendment correctly. The judgment is affirmed.

AFFIRMED.

DOROTHY RAMOLD, APPELLANT, V. QUINTIN RAMOLD, APPELLEE.

196 N. W. 2d 372

Filed April 14, 1972. No. 38162.

Divorce: Alimony: Trial. The fixing of the amount of alimony rests, in each case, within the sound discretion of the court.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Edward E. Hannon of Cronin & Hannon, for appellant.

Robert T. Finn, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a divorce action. Plaintiff, Dorothy Ramold, has appealed. The only question presented is with reference to permanent alimony and a division of property. We affirm the judgment of the district court.

The parties were married in March of 1962 and lived together for a little over 7 years. At the time of the divorce plaintiff was 52 and defendant 53 years of age. Plaintiff had been previously married and had seven children by her first marriage, five of whom were still living at home. It was defendant's first marriage. Plaintiff operated a restaurant which she sold subsequent to the marriage, but she continued to work outside the home. She owned 720 acres of land subject to a mortgage of $7,800 which was reduced during the marriage by approximately $4,000. She also owned her home. Defendant was a cattle speculator and, at the time of his marriage, owned 1,040 acres of land and two city lots. During the marriage he acquired an additional 400 acres of land. Most of the land is encumbered but its value has increased due to inflation and the installation of irrigation systems. Evidence of property values is contradictory and somewhat incomplete. Evidence of contributions of the parties during the marriage is very contradictory and nebulous due largely to the fact that both parties were in the habit of paying for purchases made, and bills accruing, in cash rather than by check.

The trial court awarded to each party the real estate owned by each. Plaintiff received all household goods

and a joint bank account in an undisclosed amount. She was also awarded permanent alimony in the sum of $20,000, payable at the rate of $2,000 per year.

A review of the record fails to indicate an abuse of discretion by the trial court. "The fixing of the amount of alimony rests, in each case, within the sound discretion of the court." Neeman v. Neeman, 183 Neb. 105, 158 N. W. 2d 236.

The judgment of the district court is affirmed. Plaintiff is awarded the sum of $500 for the services of her attorney in this court.

AFFIRMED.

KATHLEEN OBERG, APPELLANT, V. ROLAND OBERG, APPELLEE.
196 N. W. 2d 371

Filed April 14, 1972. No. 38163.

Divorce: Parent and Child: Appeal and Error: Evidence. The discretion of the district court respecting custody and support of minor children is subject to review. The determination of the trial court, however, ordinarily will not be disturbed unless there has been a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the district court for Phelps County: NORRIS CHADDERDON, Judge. Affirmed.

Kelly & Kelly, for appellant.

Person, Dier & Person, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The district court granted an absolute divorce to defendant, Roland Oberg, on the ground of adultery committed by plaintiff, Kathleen Oberg. It generally awarded custody of the minor children to Roland. Kathleen appeals. She asserts that her misconduct without more

is inconsequential when the welfare of the children is at stake.

The petition for divorce was filed in March 1970, and trial was held in March 1971. The decree awarded custody of both children to Roland and reasonable visitation to Kathleen. Each parent alternately was to possess the children on holidays and birthdays. The court also awarded Kathleen possession from June 1 each year to 1 week prior to the commencement of the next school term.

Roland emigrated to the United States from Sweden. He and Kathleen were married in June 1962. Two children were born of the marriage; Ann Britt, April 23, 1963; and Nels Eric Roland, April 15, 1969.

Roland was a tenant near Holdrege on a farm of 400 acres, of which more than 300 acres was irrigated. The share basis was 40 percent - 60 percent. He had earned additional small amounts at custom work and carpentry. He was industrious, temperate respecting liquor, religious, and self-controlled. He participated actively in the rearing of the children. Ann attended a relatively new, modern school with 4 or 5 teachers in an R-6 district.

Kathleen, holder of an A.B. degree, taught school approximately 5 years. While the family was together she was a good mother apart from the effect of her misconduct. She engaged in extramarital sexual relations both before and after the separation of the parties and the filing of the petition for divorce. She possessed a reputation in the community for clandestine association with other men.

During the interval between the filing of the petition and the trial Kathleen moved to the home of her parents in Des Moines, Iowa. She had temporary custody of both children. There she resumed teaching school. In 1971 her father, Dr. William H. Coppock, was retired head of the Chemistry Department at Drake University,

and he retained the classification of Professor of Chemistry.

Roland is financially able to provide a home for both children on the farm that has been their home. His industry and high moral and religious standards, as well as his love for the children, are beyond serious question. Under the decree Ann would resume attendance at her R-6 school.

While the family was together, Kathleen was a good mother apart from the effect of her infidelity. After the separation, the children did not become pawns in a struggle for power between the parents. The district court reasonably may have made the foregoing findings.

The discretion of the district court respecting custody and support of minor children is subject to review. The determination of the trial court, however, ordinarily will not be disturbed unless there has been a clear abuse of discretion or it is clearly against the weight of the evidence. See Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647 (1971).

There is no axiology of variables in comparing the positions of the Coppock family and Roland. The financial circumstances of the Coppocks probably are better. They also may offer superior educational opportunities. On the other hand the misconduct of Kathleen has not been limited to one or two occasions. Its continuance constitutes a potential source of harm to the moral welfare of the children; free love is not a way of life everywhere. Under the decree Ann would return to her home, school, and friends.

The judgment of the district court was not prejudicially erroneous. It is affirmed.

AFFIRMED.

STATE OF KANSAS, APPELLANT, V. N. J. HOLEB, ALSO KNOWN AS N. J. HOLUB, APPELLEE.
196 N. W. 2d 387

Filed April 14, 1972. No. 38168.

1. **Bills and Notes: Words and Phrases.** Issue means the first delivery of an instrument to a holder or a remitter.
2. ———: ———. Delivery means voluntary transfer of possession.
3. **Bills and Notes: Agency: Postal Service.** When a person is the first party to a transaction to make use of the mails and thereby effects delivery of an instrument, he has made the postal service his agent.
4. **Criminal Law: Pleadings: Extradition.** It is immaterial that the complaint did not specifically allege the commission of acts in this state intentionally resulting in a crime in Kansas when the requisition makes such facts clear.
5. **Criminal Law: Parties: Extradition: Statutes: Constitutional Law.** Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid a view of their duties so narrow as to afford permanent asylum to offenders against laws of another state.
6. **Criminal Law: Parties: Extradition: Pleadings.** One who commits an act in one state intentionally resulting in a crime in another state may be extradited, and the statement in the Governor's warrant that accused is a fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded as surplusage.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellant.

Nye, Wolf & Hove, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a habeas corpus proceeding instituted by appellee for the purpose of resisting extradition to the

State of Kansas. The Kansas requisition papers disclose that Holub was charged with having knowingly, in the State of Kansas, drawn, made, uttered, issued, and delivered an insufficient fund check. The record further discloses that the check was drawn on Holiday Markets, Inc., d/b/a Kearney Packing Company, signed by Holub as treasurer, and mailed to Chandler Livestock Auction, Inc., in Kansas. The Kearney Packing Company was a Nebraska concern and the check was drawn and mailed in Nebraska in payment of cattle purchased after receipt of word from the company's purchasing agent in Kansas as to the amount due Chandler Livestock Auction. The cattle were sold on September 10, the check dated September 11, the cattle loaded out on September 14, and the check received on either September 14 or 15. The district court entered judgment for appellee. We reverse that judgment.

The pertinent Kansas statutes are as follows: "(1) Giving a worthless check is the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order or draft on any bank or depository for the payment of money or its equivalent with intent to defraud and knowing, at the time of the making, drawing, issuing or delivering of such check, order or draft as aforesaid, that the maker or drawer has no deposit in or credits with such bank or depository or has not sufficient funds in, or credits with, such bank or depository for the payment of such check, order or draft in full upon its presentation.

"(2) In any prosecution against the maker or drawer of a check, order or draft payment of which has been refused by the drawee on account of insufficient funds, the making, drawing, issuing or delivering of such check shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank or depository, * * *." K.S.A. 1971 Supp. 21-3707.

"(1) An individual who performs criminal acts, or causes such acts to be performed, in the name of or on behalf of a corporation is legally responsible to the same extent as if such acts were in his own name or on his own behalf." K.S.A. 1971 Supp. 21-3207.

Appellee contends that he committed no crime in Kansas. It is true that the check was drawn and made in Nebraska, not Kansas. However, the drawing, making, and mailing of the check in Nebraska resulted in its issuance and delivery in Kansas which is a violation of the Kansas statute. " 'Issue' means the first delivery of an instrument to a holder or a remitter." § 3-102(1)(a), U.C.C. " 'Delivery' * * * means voluntary transfer of possession." § 1-201(14), U.C.C. When a person is the first party to a transaction to make use of the mails and thereby effects delivery of an instrument, he has made the postal service his agent. See, First Nat. Bank v. Ernst, 117 Neb. 34, 219 N. W. 798; Fairchild v. Fairchild, 176 Neb. 95, 125 N. W. 2d 191.

Appellee attacks the extradition proceedings on the ground that there is some variance between the complaint and the facts shown in the requisition papers. As mentioned above, the check was actually drawn and made in Nebraska rather than in Kansas as alleged. The requisition does reveal the true facts and is sufficient to apprise appellee of the true nature of the offense charged. It clearly appears that appellee is charged with doing certain acts in Nebraska which resulted in a crime in Kansas. The variance is not fatal. It is immaterial that the complaint did not specifically allege the commission of acts in this state intentionally resulting in a crime in Kansas when the requisition makes such facts clear. See, In re Cooper, 53 Cal. 2d 772, 3 Cal. Rptr. 140, 349 P. 2d 956; Self v. People, 133 Colo. 524, 297 P. 2d 887. In People ex rel. Robert v. Warden of New York City Prison, 114 N. Y. S. 2d 13, it was held: "Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to inter-

state extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid a view of their duties so narrow as to afford permanent asylum to offenders against laws of another state."

Appellee also urges that the extradition warrant issued by the Governor of Nebraska is defective in that it states appellee is a fugitive from justice. Historically, to be a fugitive from justice, one had to be in the state where the crime was committed at the time of its commission. Prior to the adoption of provisions contained in the Uniform Criminal Extradition Act, status as a fugitive was essential to extradition. This is no longer the case. One who commits an act in one state intentionally resulting in a crime in another state may now be extradited. See § 29-734, R. R. S. 1943. Although not within the formerly adhered to strict definition of a fugitive, one who thus seeks to evade the administration of justice in the state where the offense was perpetrated is, in essence, a fugitive from the justice of such state. Under similar circumstances it was held in Clayton v. Wichael, 258 Iowa 1037, 141 N. W. 2d 538, that: "The statement in the Governor's warrant that plaintiff is a fugitive from justice from Oregon and has taken refuge in Iowa in view of the record before us must be disregarded as surplusage." Of similar import are People ex rel. Brenner v. Sain, 29 Ill. 2d 239, 193 N. E. 2d 767; Harrison v. State, 38 Ala. App. 60, 77 So. 2d 384.

We conclude that the extradition proceeding is valid and the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

EDWARD HAFFKE, BY AND THROUGH HIS FATHER AND NEXT FRIEND, CARL HAFFKE, APPELLANT, V. EDWARD H. GRINNELL, APPELLEE.

196 N. W. 2d 390

Filed April 14, 1972. No. 38177.

1. **Motions, Rules, and Orders: Judgments: Trial: Evidence.** In determining whether a motion for judgment notwithstanding the verdict should have been sustained, the evidence must be considered in the light most favorable to the party who obtained the verdict.
2. **Motor Vehicles: Negligence.** A motorcyclist who observes a turning signal on an automobile preceding him but fails to maintain control over his vehicle sufficient to enable him to avoid a collision with the automobile when the movement indicated is made, is guilty of contributory negligence as a matter of law which is more than slight and sufficient to bar his recovery.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Burbridge & Burbridge, for appellant.

Fraser, Stryker, Marshall & Veach, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This case arose out of a collision between a motorcycle and an automobile. The jury returned a verdict for the plaintiff in the amount of $22,500. The trial court sustained the defendant's motion for judgment notwithstanding the verdict and dismissed the action. The plaintiff appeals.

The accident happened at about 5 p.m., on May 20, 1969, at the intersection of Forty-seventh and Lafayette Streets in Omaha, Nebraska. Forty-seventh Street at that point is a part of the Northwest Radial Highway and runs generally north and south. The 3 southbound lanes are separated from the northbound lanes by a center median. Each lane is 10 feet wide. Lafayette Street

forms a T-intersection with Forty-seventh Street and runs to the west. Saddle Creek Road runs to the northwest from the same intersection.

Hamilton Street intersects with Forty-seventh Street approximately 363 feet north of Lafayette Street. A Ginn Oil Company service station is located on the west side of Forty-seventh Street between Hamilton and Lafayette Streets. The south exit from the filling station is 169 feet south of Hamilton Street.

The plaintiff was operating his 1968 Riverside motor bike, which he described as medium-sized with a 20-horsepower engine. The plaintiff was proceeding south on Forty-seventh Street in the right lane and had stopped for a traffic light on the north side of the Hamilton Street intersection. After the light changed to green, and as the plaintiff was starting forward, he saw the defendant's automobile leave the south exit of the Ginn Service Station and turn south on Forty-seventh Street. The defendant's right turning signal was turned on as the defendant was coming out of the service station. The defendant turned south on Forty-seventh Street with his right wheels on the lane marker between the curb lane and the center lane or 1 foot west of the lane marker.

The defendant was driving his 1956 Oldsmobile automobile south on Forty-seventh Street at between 10 and 20 miles per hour, intending to turn at the Lafayette-Saddle Creek intersection. The defendant testified that he had turned on his right turn signal light as soon as he was on Forty-seventh Street. The defendant saw there were other vehicles behind him but did not see the plaintiff at any time before the impact. The defendant testified that as he approached the intersection he applied his brakes and commenced his turn, and that the impact occurred when the front half of his automobile was in the area where the streets came together.

The plaintiff proceeded south on Forty-seventh Street, traveling about 4 feet east of the west curb on Forty-

seventh Street. He accelerated to a speed of 30 to 35 miles per hour until he was within 6 to 8 feet of the rear of defendant's automobile. The plaintiff then "stopped accelerating" or began "decelerating" because he was uncertain what the defendant's actions would be. When defendant's automobile was very close to the Lafayette-Saddle Creek intersection and the plaintiff was about 6 feet behind the defendant's automobile, the defendant's brake lights came on and the defendant commenced his turn. The plaintiff sounded his horn, applied his brakes, and the impact occurred. The plaintiff was thrown from the motorcycle and injured.

The jury could find that the defendant was negligent in failing to maintain a proper lookout and in failing to approach the intersection in the right traffic lane when intending to turn to the right as required by an ordinance of the City of Omaha. The question presented is whether the evidence established as a matter of law that the plaintiff was guilty of contributory negligence which was more than slight and sufficient to bar his recovery. In determining that question the evidence must be considered in the light most favorable to the plaintiff. Mills v. Bauer, 180 Neb. 411, 143 N. W. 2d 270.

The answer alleged that the plaintiff was negligent in failing to maintain a proper lookout and reasonable control over his motorcycle; in traveling at an excessive speed; and in traveling too close to the defendant's automobile.

The plaintiff admits that he observed the defendant's right turn signal and that he was uncertain as to what the defendant's actions would be. He testified that he did not intend to pass the defendant's automobile but was intending to wait and see if the defendant was going to make a lane change.

The plaintiff had no right to disregard the defendant's turn signal and was obligated to maintain control over his motorcycle sufficient to avoid a collision if the defendant made the movement indicated by his signal.

By approaching to within 6 or 8 feet of the rear of the defendant's vehicle and at a relative speed much greater than that of the defendant, the plaintiff placed himself in a position in which he was unable to avoid the collision. See Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. This was contributory negligence as a matter of law which was more than slight and sufficient to bar his recovery.

The plaintiff argues that he was not required to anticipate the defendant's negligence and was only required to have such control as would enable him to avoid a collision with other vehicles which were being operated with due care. It is true that complete control such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, *in the absence of notice, warning, or knowledge* is not required. Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra*. Here there was notice of an impending movement by the defendant's automobile, which the plaintiff observed, but the plaintiff failed to maintain sufficient control to enable him to avoid a collision when the movement was made.

The judgment of the district court is affirmed.

AFFIRMED.

GARY L. VAN OSTRAND, APPELLANT, V. MELVIN L. BECCARD, APPELLEE.
196 N. W. 2d 385

Filed April 14, 1972. No. 38187.

1. **Motor Vehicles: Negligence.** A motorist is under a duty to keep a proper lookout and watch where he is driving, although he has the right-of-way. When in a place of relative safety he sees, or in the exercise of reasonable care, should have seen, the approach of a moving vehicle in close proximity, and he moves from the place into the path of the approaching vehicle and is struck, his conduct constitutes negligence.
2. ———: ———. Bright sunlight ordinarily is a condition that

does not excuse the duty of a motorist to look and see approaching vehicles operated without negligence within the radius that denotes the limit of danger.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded with directions.

Herbert J. Friedman, for appellant.

Michael W. Brown of Healey, Healey, Brown & Burchard, for appellee.

Heard before WHITE, C. J., SPENCER, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

PER CURIAM.

A negligence claim by Gary L. Van Ostrand against Melvin L. Beccard resulted from a collision between crossing automobiles in a controlled urban intersection. A jury returned a verdict for Beccard. Van Ostrand appeals. He asserts that no reasonable man could fail to find for him on issues of liability.

The intersection, located in Lincoln, was formed by Forty-fifth Street for north-south traffic and Vine Street for east-west traffic. Stop signs on both sides of Forty-fifth Street protected motorists on Vine Street. Our examination of the record indicates no evidence of the prima facie lawful speed limit on Vine Street at the time and place in question. See § 39-7,108, R. R. S. 1943. The parties seem impliedly to concur that the limit was 35 miles an hour.

The collision occurred on November 14, 1969, at 4 p.m. Parts of streets were wet, but the temperature was 25 degrees F. The sun was shining. Van Ostrand was eastbound in a 1969 Volkswagen, and Beccard was southbound in a 1963 Mercury equipped with a stickshift.

Van Ostrand at a speed of 35 miles an hour and at a short distance east of Forty-fourth Street saw the Mercury begin to move south from the stop sign. He tapped his brakes. The Mercury then momentarily stopped

so that it occupied most of the traveled part of Vine Street for westbound traffic. It occupied no part of the lanes for eastbound traffic. Van Ostrand released his brake in the belief that Beccard was waiting for him to cross. The interval of the stop was a second. The Mercury then suddenly darted ahead. Van Ostrand in his inside lane of travel laid down skid marks 23 feet long. The front of the Volkswagen struck the right front fender of the Mercury. Damage to the automobiles was heavy.

Beccard had parked his Mercury in the parking lot of the Richman-Gordman store 1½ hours. He intended to proceed across the street to K-Mart on the other side of the intersection. He backed out of the stall, drove 30 feet to Forty-fifth Street, turned left to go south, proceeded south about the length of the car, waited for two automobiles in front of him to leave, and then moved a car length to the stop sign.

After traffic on Vine Street cleared, Beccard entered the intersection. The engine sputtered, and in low gear the Mercury stopped. Beccard immediately obtained sufficient engine r.p.m. for normal movement. He saw no approaching westbound traffic, but he saw a knoll somewhere east of the intersection. He feared that a westbound motorist with limited visibility would collide with him. He testified to the knoll vaguely. He admittedly was anxious to clear the intersection in a hurry. He looked westward for approaching traffic, however, prior to moving. Bright sunlight limited his vision to 150 feet. He saw no traffic. He darted ahead in low gear. He first saw the Volkswagen when it was 15 feet away.

Beccard testified to mechanical failure that had not occurred previously. There was no evidence that the parking lot had been open, enclosed, heated, or not heated; or that the temperature of the Mercury engine had fallen below normal for efficient operation. An inference that Beccard wore no sunglasses is compelling.

A motorist is under a duty to keep a proper lookout and watch where he is driving, although he has the right-of-way. When in a place of relative safety he sees, or in the exercise of reasonable care should have seen, the approach of a moving vehicle in close proximity, and he moves from the place into the path of the approaching vehicle and is struck, his conduct constitutes negligence. Cf. Heavican v. Holbrook, 187 Neb. 814, 194 N. W. 2d 208 (1972); Hayes v. Anderson Concrete Co., Inc., 186 Neb. 771, 186 N. W. 2d 477 (1971); Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605 (1959). Bright sunlight ordinarily is a condition that does not excuse the duty of a motorist to look and see approaching vehicles operated without negligence within the radius that denotes the limit of danger. Sunglasses are offered for sale at moderate prices. See, generally, Schmeling, "The Range of Vision Rule in Nebraska," 49 Neb. L. Rev. 7 (1969).

Van Ostrand and another motorist testified to Van Ostrand's speed of 35 miles an hour and to a flow of traffic on Vine Street at that speed. We assume that a prima facie lawful speed limit governing Van Ostrand and exceeding 34 miles an hour existed. Notwithstanding the existence of the knoll and Beccard's fears, a reasonable trier of fact must find that Beccard was negligent. The evidence was insufficient to support a finding of contributory negligence on the part of Van Ostrand unless a prima facie speed limit governing him was nonexistent or less than 35 miles an hour. See § 39-7,108, R. R. S. 1943.

The judgment is reversed and the cause remanded for a new trial. Should the evidence prove that a prima facie lawful speed limit governing Van Ostrand exceeded 34 miles an hour, the only issue for the trier of fact would be that of damage. Otherwise the new trial should be general.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. FREDDIE MINOR, APPELLANT.
195 N. W. 2d 158

Filed April 14, 1972. No. 38204.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. On motion for rehearing. See *ante* p. 23, 195 N. W. 2d 155, for original opinion. Motion for rehearing overruled.

J. William Gallup of Schrempp & Bruckner, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J., dissenting.

I concur in the order overruling the defendant's motion for rehearing, but the sentence should be reduced to imprisonment for not less than 1 year nor more than 2 years in accordance with the rule announced in State v. Roberts, *ante* p. 209, 196 N. W. 2d 118, decided March 24, 1972. See § 28-4,125 (3), R. S. Supp., 1971.

MCCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. FERGUSON, JR., APPELLANT.
196 N. W. 2d 374

Filed April 14, 1972. No. 38294.

1. **Criminal Law: Rape: Witnesses: Evidence.** Under the law of Nebraska, an accused charged with rape cannot be convicted solely on the testimony of the prosecutrix.
2. **Criminal Law: Rape: Witnesses: Evidence: Trial.** In a prosecution for rape, while evidence of a prompt complaint standing alone is insufficient corroboration, such evidence is for the con-

sideration of the jury as corroboration of the main facts in issue.

3. ———: ———: ———: ———: ———. In a prosecution for rape, it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue.

4. **Criminal Law: Rape: Sentences.** Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within statutory limits will not be disturbed unless an abuse of discretion appears.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Beatty, Morgan & Vynhalek, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

The defendant, James L. Ferguson, Jr., was found guilty by a jury of the crimes of rape and robbery. He was sentenced to a term of 5 to 8 years for the rape and 3 to 4 years for the robbery, the sentences to be served consecutively. The defendant's principal complaints on appeal assert a lack of sufficient corroboration for the offense of rape, and excessiveness of the sentences.

The complaining witness was a young married woman, separated from her husband, and living alone in a basement apartment at 1003 East 4th Street in North Platte, Nebraska. She attended college from 1964 to 1967, and was married in 1968. She had moved to North Platte from Lincoln, Nebraska, after separating from her husband. She was employed as a receptionist and secretary by a fire detection company in North Platte.

On February 25, 1971, she left her place of employment at 8 o'clock in the evening. She walked home

from work with stops at a grocery store and the post office and approached the door of the building in which her apartment was located at approximately 8:30 p.m. On her way home, she had noticed a yellow older model pickup truck being pushed out of a filling station and later saw the same truck parked near a motel located 2 blocks from her home. The entrance to her apartment was in the rear of the house which had been divided into apartments. Just as she reached the door, a young man called to her and asked if she had a car and if she could give him a push. She thought he looked to be about high school age. When she told him she had no car, he then asked to use the telephone and she referred him to an upstairs neighbor. At this point, she bent over to pick up the newspaper. The defendant took hold of her and placed a knife at her throat and a hand across her mouth. He told her to be quiet and that they were going to take a walk and to walk normally and naturally. Still carrying the newspaper, she was led 2 or 3 blocks north and across the railroad tracks. As they were crossing the railroad tracks, she hesitated. The defendant jerked her arm and she fell and skinned her right knee. The defendant led her between two buildings in the warehouse district and demanded money. She gave him the $8 which she had in her wallet. At this point the defendant said: "Not so fast; there's more." She screamed. The defendant again produced what she believed to be a knife, tripped her and threw her to the ground, put his knee on her chest, held the knife at her throat, threatened to kill her when she screamed, and then raped her. Afterward the defendant walked part way back with her and left.

Upon entering her apartment, she changed her clothes and called a friend at approximately 9:05 p.m. The friend and her husband came over immediately. The complaining witness was very excited and agitated, and related the story to them and they took her to the police station. There she complained that she had been raped

and robbed by a white male about 16 years old. She gave a complete statement to the police. The police showed her a file of over 200 pictures and she identified a picture of the defendant as the closest resemblance to her assailant. She took the police to the area of the crime. Pictures were taken of the scene. Most notable was a footprint left by a boot, and a newspaper of that date. A plaster cast of the footprint was later taken by the police. The police picked up the complaining witness' clothes some 3 or 3½ hours after the attack and at that time her panty hose were "pretty dry."

The defendant was arrested at his home the next morning. He was hiding under the floor. Clothes were recovered which generally matched the description given by the complaining witness of the clothing worn by her assailant. The plaster cast of the footprint at the scene and the defendant's boots were admitted in evidence. The defendant was 18 years of age, matched the physical description given at the time, and was identified by the complaining witness at the trial as her assailant.

A young girl who lived with him was the only witness for the defendant. She testified that on the night in question the yellow pickup in which they were riding had failed to start. A gasoline station attendant pushed them without success and left the truck in front of a motel. The defendant went to get somebody to push them and the girl testified that she waited inside the motel office for about 10 minutes before he returned. She testified that he was not disheveled or nervous when he returned. The truck then started and they returned home. She testified that he did not have a knife on that evening that she knew of. The truck was a family vehicle which the defendant frequently used.

The defendant asserts that the evidence to corroborate the testimony of the complaining witness is insufficient as corroboration for the crime of rape. Under the law of Nebraska an accused charged with rape cannot be

convicted solely on the testimony of the prosecutrix. Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907.

In this case there is no question but that the victim made complaint to her friends and to the police immediately following the commission of the crime. While that fact alone might be insufficient, it is clearly for the consideration of the jury as corroboration of the main fact in issue. See State v. Hunt, 178 Neb. 783, 135 N. W. 2d 475.

Unfortunately, the police did not request it and no medical examination of the complaining witness was made at the time, although the police did take pictures of her skinned knees. There is therefore no direct corroboration as to the act constituting the offense of rape. In this state, however, it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Hunt, *supra;* State v. Garza, 187 Neb. 407, 191 N. W. 2d 454. On the facts before us there is substantial evidence of material facts and circumstances in addition to the testimony of the prosecutrix from which the jury properly may have and did draw the inference of guilt. The fact that the same corroborative evidence substantiated both crimes does not mean that its use must be limited to one.

The defendant also contends that the sentences here were excessive. The statutory sentence limits for both rape and robbery are not less than 3 nor more than 50 years imprisonment. The defendant received a sentence of 5 to 8 years for rape and 3 to 4 years for robbery. The defendant's misdemeanor conviction record extends back to his commitment to the Boys' Training School at the age of 13. Two separate felony charges were dropped by the prosecutor at time of sentencing. The record fully supports the action of the trial court and clearly establishes that there was no abuse of discre-

tion here. Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears. State v. Thompson, 187 Neb. 682, 193 N. W. 2d 561.

The judgment of the trial court was correct in all respects and is affirmed.

AFFIRMED.

LAWRENCE C. SANDBERG, JR., APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.
196 N. W. 2d 501

Filed April 18, 1972. No. 38243.

1. **Constitutional Law: Statutes.** Classifications are limited to and are necessary for the accomplishment of the legitimate purposes of legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purposes of the act.
2. **Constitutional Law: Statutes: Legislature: Taxation.** It is a fundamental law of this State that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution. It is axiomatic, therefore, that the provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the State, lodged in the Legislature.
3. ———: ———: ———: ———. It is not denied that since the adoption of the Fourteenth Amendment, State taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes, but the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest.
4. **Constitutional Law: Legislature: Taxation.** Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
5. **Words and Phrases: Taxation.** A tax is not an assessment of benefits. It is a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is

consequently entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

6. **Constitutional Law: Statutes: Legislature: Governor.** A legislative bill, passed with an emergency clause, vetoed by the Governor, is within the ambit of Article IV, section 15, Constitution of Nebraska, and requires only a three-fifths vote to override the veto.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Lawrence C. Sandberg, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellees.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL, District Judge.

SPENCER, J.

This is an appeal from the sustaining of appellees' general demurrer to appellant's petition. The action, brought on behalf of appellant and all others similarly situated, seeks to declare Laws 1971, LB 87, now sections 77-2602, 77-2608, 77-2610, 77-2616, 85-1,100, 85-1,101, and 85-1,102, R. S. Supp., 1971, unconstitutional, and to enjoin its enforcement. The questions presented are solely ones of law and not of fact. We affirm the sustaining of the demurrer.

LB 87 increases the tax on cigarettes from 8 to 13 cents per package, and appropriates the 5 cent increase as follows: To the Department of Public Institutions for the construction of an activities building at the Beatrice State Home, until the sum of $695,000 is accumulated. Thereafter, said tax is appropriated equally to the State Office Building Fund, and the University of Nebraska at Lincoln Field House Fund. The bill was enacted with the emergency clause, on a vote of 34 Ayes, 11 Nays, and 4 Not Voting. It was sent to the Governor and returned by him without his signature, which constituted a veto. The Legislature then voted

to override the veto, as follows: 31 Ayes, 14 Nays, and 4 Not Voting.

Appellant contends that LB 87 is unconstitutional for the following reasons: (1) It constitutes a special law in favor of the State, in violation of Article III, section 18, Constitution of Nebraska; (2) it deprives appellant of his property without due process of law, and violates his equal rights in violation of the provisions of both the Nebraska and the United States Constitutions; and (3) it was not enacted by a sufficient vote to override the veto of the Governor.

Article III, section 18, Constitution of Nebraska, specifically provides that the Legislature shall not pass local or special laws in certain specified areas, and then provides: "In all other cases where a general law can be made applicable, no special law shall be enacted."

Appellant contends that when the Legislature enacted a law providing a tax increase upon a given and limited segment of the population of the State, and provided within the law that the proceeds thereby raised be used for specified and limited public facilities bearing no relation to the tax or to the taxpayers, such law must be determined to have been enacted solely for the purpose of accomplishing the construction of the public facilities enumerated, and accordingly the same constituted a special law in favor of the State. Appellant argues that such action by the Legislature "violates the letter, if not the intent, of Article III, Section 18, of the Nebraska Constitution."

If we understand the thrust of appellant's argument, it is that any construction of the nature involved constitutes a special law in favor of the State. Appellant misinterprets the intent of Article III, section 18, Constitution of Nebraska. The same point was raised in Stewart v. Barton (1912), 91 Neb. 96, 135 N. W. 381, involving an act to appropriate $100,000 for the construction and equipment of a laboratory building on the campus of the Medical College of the University of

Nebraska at Omaha. The following language from that case is particularly pertinent: "While it is alleged that this is the purpose of the act, the allegation is mere surplusage, since it is clearly beyond the power of the court to inquire into the springs of legislative action. With inquiries as to the hidden motives prompting the enactment of laws or the wisdom of legislative measures, the courts can have nothing to do. Moreover, the prohibition against the legislature enacting local or speical laws is not general, but is confined to the specific cases mentioned in section 15, art. III of the constitution. It is within its power to legislate upon any subject not therein prohibited (State v. Moores, 55 Neb. 480, 489), and we find no prohibition in the clause mentioned against such an act as this."

If appellant is inferentially arguing that the tax in and of itself is a special law, the question is entirely one of classification. In Gossman v. State Employees Retirement System (1964), 177 Neb. 326, 129 N. W. 2d 97, we said: "The principles to be applied to testing legislative classification have been well established. The difficulty arises in their application to a particular set of facts or a particular legislative act. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The Legislature may, and many times must, carve out classes or distinctions that would appear arbitrary or unreasonable. But, on closer examination, it is found that the classifications are related to and are necessary for the accomplishment of the legitimate purposes of the legislation. The question is always whether the things or persons classified by the Act form by themselves a proper and legitimate class with reference to the purposes of the Act. See 2 Sutherland, Statutory Construction (3d Ed.), § 2104, p. 14. See, also, Wilson v. Marsh, supra; Hessian v. Ervin, 204 Minn. 287, 283

N. W. 404; Lickert v. City of Omaha, supra; Sullivan v. City of Omaha, supra."

Appellant in argument conceded that the class of cigarette purchasers forms a legitimate class for the purpose of imposition of a tax, and that the three proposed building funds are proper purposes for the benefit of the general public. He admits that if two bills had been introduced, one to increase the cigarette tax and one to fund the constructions provided for in LB 87, there would be no constitutional question. He argues in that situation two final votes would have been required, and either might have failed. This has nothing to do with the special law argument.

There have been many other instances where the Legislature has made specific disposition of tax proceeds directly into special funds without first putting them into the General Fund and without any particular connection or relationship to the taxpayer. We believe, however, that this is the first time this practice has been challenged before this court.

In Cincinnati Soap Co. v. United States (1937), 301 U. S. 308, 57 S. Ct. 764, 81 L. Ed. 1122, which involved an excise tax on coconut oil, the Supreme Court said, referring to the attack on the tax: "It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation. The only concern which we have in that aspect of the matter is to determine whether the purpose specified is one for which Congress can make an appropriation without violating the fundamental law. If Congress, for reasons deemed by it to be satisfactory, chose to adopt the quantum of receipts from this particular tax as the measure of

the appropriation, we perceive no valid basis for challenging its power to do so."

In State ex rel. School Dist. of Scottsbluff v. Ellis (1959), 168 Neb. 166, 95 N. W. 2d 538, we said: "It is the fundamental law of this state that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution. It is axiomatic therefore that the provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the state lodged in the Legislature. State ex rel. Atchison & N. R. R. v. Lancaster County, 4 Neb. 537, 19 Am. R. 641; State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67. It is just as fundamental that the power to tax and the power to provide for the disposition of taxes raised are identical and inseparable, and the Legislature is clothed with full power and control over the disposition of revenues derived from taxation, including those raised by political subdivisions of the state under authority of the state, subject only to constitutional restrictions. 85 C. J. S., Taxation, § 1057, p. 644."

Appellant admits that the facilities funded by LB 87 are for proper public purposes and every citizen in the State has an interest in them. His principal contention, however, is that cigarette purchasers have no more interest or stake in the facilities funded by the proceeds of the increase in the cigarette tax than nonsmokers. He questions the power of the Legislature to tax that one segment of the population for projects which benefit the entire population. Actually, many tax exactions do exactly this. There is a general discussion on the subject in 51 Am. Jur., Taxation, § 332, p. 382, where this language is found: "Property may not be taxed for a purpose in which the owners or occupants have no interest, from which they can derive no benefit, and which is solely for the benefit of others. If a tax levy, however, is for a public purpose, it is no objection to its validity that the benefits paid and

the persons to whom they are paid are unrelated to the persons taxed. Nothing is more familiar in taxation than the imposition of tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied by the tax. A tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."

In Carmichael v. Southern Coal & Coke Co. (1937), 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327, the Supreme Court discussed this problem, saying: "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. * * * This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. * * *

"A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function. * * *

"It is not denied that since the adoption of the Fourteenth Amendment state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes. * * * but

the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest. * * *

"Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See Cincinnati Soap Co. v. United States, supra. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. Thomas v. Gay, 169 U. S. 264, 280. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him."

Appellant's third assignment, that LB 87 was not enacted by a sufficient vote to override the veto of the Governor, presents a more serious question.

Under the agreed facts, this bill was enacted by the Legislature on April 20, 1971, by a vote of 34 Ayes, 11 Nays, and 4 Not Voting. On April 26, 1971, the Governor returned the bill to the Legislature without his signature. The Legislature then, on a vote to over-

ride the veto, voted 31 Ayes, 14 Nays, and 4 Not Voting.

Article III, section 27, Constitution of Nebraska, provides in part: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall, by a vote of two-thirds of all the members elected to each House otherwise direct." Two-thirds of the 49 members of the Legislature is 33. Thirty-four votes, therefore, were more than adequate to pass the bill with the emergency clause. When the Governor vetoed the bill, this brought into play Article IV, section 15, Constitution of Nebraska, which provides in part: "Every bill passed by the Legislature, before it becomes a law, * * * shall be presented to the Governor. If he approves he shall sign it, and thereupon it shall become a law, but if he do not approve, he shall return it with his objections to the House in which it shall have originated, which House shall enter the objections at large upon its journal, and proceed to reconsider the bill. * * * and if approved by three-fifths of the members elected * * * it shall become a law, notwithstanding the objections of the governor."

Appellant's point is that although the bill originally passed with sufficient votes to justify the emergency clause, that notwithstanding the provisions of Article IV, section 15, it required 33 votes to override the Governor's veto when the bill contained the emergency clause. It is the State's contention that this situation is controlled by Article IV, section 15, regardless of the vote required to pass the bill in the first instance.

The history of Article IV, section 15, would refute appellant's contention. This language came into the Constitution in 1875. Volume III, Nebraska Constitutional Convention (1913), is an official report of the Journals of the Convention of 1875. On pages 565 and 566 is found the proposed draft of section 15. It reads,

so far as material herein, as follows: "Every bill passed by the legislature, before it becomes a law, * * * shall be presented to the governor. If he approve, he shall sign it and thereupon it shall become a law; but if he do not approve he shall return it with his objections to the house in which it shall have originated, which house shall enter the objection at large upon its journals and proceed to reconsider the bill. If, then, three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by three-fifths of the members elected to that house, it shall become a law, notwithstanding the objections of the governor; *but the vote necessary to repass such bill shall not be less than that required on the original passage in each house.*" (Emphasis supplied.)

At page 597, we find the following: "Mr. President, the convention, in committee of the whole, have had under consideration the article on Executive and made the following amendments thereto: * * *

"4th. Strike out the words 'but the vote necessary to repass such bill shall not be less than that required on the original passage in each house,' in lines 10, 11 and 12, in section 15."

On page 599 we find: "The question being upon the adoption of the executive article as amended and reported back by the committee of the whole house, the first, second, third, fourth, and fifth amendments were concurred in."

It would, therefore, seem patent that the Constitutional Convention considered the possibility of the exact proposition contended for by appellant, and rejected it in the adoption of Article IV, section 15. The wording of section 15 is clear and unambiguous. To read into it the interpretation contended for by the appellant would require us to amend the Constitution. This we refuse to do. We, therefore, hold that a legislative bill passed

with an emergency clause, vetoed by the Governor, is within the ambit of Article IV, section 15, Constitution of Nebraska, and requires only a three-fifths vote to override the veto.

While the case is not mentioned by the parties, we are not unmindful of State ex rel. Main v. Crounse (1893), 36 Neb. 835, 55 N. W. 246, 20 L. R. A. 265, which would seem to sustain appellant's position. That case, however, is distinguishable on its facts in that the original bill even without an emergency clause required a two-thirds vote. Insofar as some language in that opinion may be construed to hold otherwise, State ex rel. Main v. Crounse, *supra*, is overruled.

Appellant's assignments of error are without merit. The demurrer was properly sustained, and the judgment is affirmed.

AFFIRMED.

NEBRASKA MIL-NIC, INC., A CORPORATION, APPELLANT, V. HALL COUNTY, NEBRASKA, ET AL., APPELLEES, CITY OF GRAND ISLAND ET AL., INTERVENERS-APPELLEES.
196 N. W. 2d 522

Filed April 20, 1972. No. 37983.

SUPPLEMENTAL OPINION

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. On motion for rehearing. See 187 Neb. 656, 193 N. W. 2d 450, for original opinion. Original opinion affirmed as amended. Motion for rehearing overruled.

E. Merle McDermott, for appellant.

Sam Grimminger and Gerald Buechler, for appellees.

Duane A. Burns, Kenneth H. Elson, James D. Livingston, and Walter Lauritsen, for interveners-appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

On motion for rehearing, the next to the last sentence of our previous opinion is amended to eliminate the words "is later" and as amended shall read as follows:

Under these circumstances, the special statute of limitations enacted in 1967 dealing with annexation controls over the more general limitation of actions for tax refunds, because the special statute specifically expresses the legislative will. Stacey v. Pantano, 177 Neb. 694, 131 N. W. 2d 163.

With this amendment we adhere to our previous opinion and the motion for rehearing is overruled.

AFFIRMED AS AMENDED.

CLINTON, J., dissenting.

I dissent from the overruling of the motion for rehearing. I have concluded that the opinion which we adopted in the above case is patently in error and should be withdrawn and an opinion reaching the opposite results should be adopted—or at the very least that the motion for rehearing should be granted. There are several reasons for my position.

(1) In the above case we held the applicable statute of limitations was section 18-1717, R. R. S. 1943. A rereading of this statute convinces me that by its terms it has no application to refunds of a void tax, the assessment of which as the result of a court decision has been declared void. Section 18-1717, R. R. S. 1943, by its terms pertains to ". . . any action or proceeding . . . legal or equitable . . . *to contest any act done* . . . pursuant to such annexation . . . ." (Emphasis supplied.) The above case was an action for a tax refund, not an action "*to contest any act done pursuant*," etc. The record establishes that the tax in question was already void by virtue of the final decree in Pokorski v. City of Grand Island declaring the annexation in question void. The situation is therefore identical with that in Higgs v. Hall County, 184 Neb. 508, 168 N. W. 2d 920, except that here we do have before us the judgment in the

Pokorski case. Whatever section 18-1717, R. R. S. 1943, may pertain to, it does not pertain to tax refunds. This case is not an action "*to contest.*" The record here discloses that the tax has already been made void by virtue of the judgment of the invalidity of the annexation. This is a proven fact in this case.

(2) The opinion is substantially founded upon the proposition that section 18-1717, R. R. S. 1943, is the latest expression of the legislative will and therefore prevails over section 77-1736.04, R. R. S. 1943. It is not the latest expression of the legislative will as is acknowledged in the supplemental opinion of White, C. J. The opinion in citing the doctrine of "latest expression of the legislative will" must by implication hold that section 18-1717, R. R. S. 1943, impliedly repealed, in part at least, section 77-1736.04, R. R. S. 1943, for the foregoing principle applies to implied repeal where there is an inconsistency or repugnance between the two acts. 82 C. J. S., Statutes, § 291a, p. 489. Yet there is no necessary inconsistency or repugnance. Implied repeal is not favored. 82 C. J. S., Statutes, § 288, p. 479. See, also, Steeves v. Nispel, 132 Neb. 597, 273 N. W. 50. Even if these sections seemed repugnant they should be harmonized if possible. 82 C. J. S., Statutes, § 291c, p. 496.

(3) If there is a substantial question as to which of the two statutes of limitations should apply then the following principle is applicable: ". . . where there is a substantial question which of two or more statutes of limitation within the jurisdiction should be applied, the doubt should be resolved in favor of the . . . longest limitation." 51 Am. Jur. 2d, Limitation of Actions, § 63, p. 641. This court has previously so held in Crum v. Johnson, 3 Neb. Unoff. 826, 92 N. W. 1054. The issue in the Crum case was which of two conflicting statutes of limitations was applicable to an action on an appeal bond. The court held that if two conflicting statutes of limitations are equally applicable the longer period

would govern. The court there said: "After a careful investigation we can reach no other conclusion than that this action falls within the terms of section 14 exclusively. But if section 10 were equally applicable we should hold, nevertheless, that the longer period would govern." Several recent cases from other jurisdictions follow this principle. Drug, Cosmetic & Beauty Trades Service, Inc. v. McFate, 14 Ariz. App. 7, 480 P. 2d 30 (1971 — tort); Matthews v. Travelers Indemn. Ins. Co., 245 Ark. 247, 432 S. W. 2d 485 (1968 — malpractice suit); Hire v. E. I. Dupont de Nemours & Co., Inc., 211 F. Supp. 164 (1962 — action to recover severance pay); O'Malley v. Sims, 51 Ariz. 155, 75 P. 2d 50, 115 A. L. R. 634 (1938 — inheritance tax refund); Southern Pac. R. R. Co. of Mexico v. Gonzalez, 48 Ariz. 260, 61 P. 2d 377, 106 A. L. R. 1012 (1936 — contract damages); Payne v. Ostrus, 50 F. 2d 1039 (1931 — negligence).

(4) Considerations of public policy and fairness support the principles mentioned in paragraph (3) preceding. This court has held: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed." Board of Educational Lands & Funds v. Gillett, 158 Neb. 558, 64 N. W. 2d 105 (1954). If the annexation is null and void, as the record establishes it is, the plaintiff should not be placed in any worse position than those in the identical situation who have apparently received refunds. Higgs v. Hall County, *supra*.

(5) Section 77-1736.04, R. R. S. 1943, by its very terms applies to applications for refund of tax, where the tax "by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it has been or shall be adjudged and determined that any . . . tax, assessment, or penalty or any part thereof, was illegal and such

judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax . . . . If the tax, assessment, or penalty has been distributed by the collecting officer, *then the person claiming a refund, . . . shall file a claim with the county treasurer for such refund within two years after the final judgment is entered declaring such tax, assessment, or penalty as illegal.*" (Emphasis supplied.) This statute clearly covers the case at hand.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DONALD GEORGE ELROY MCDONALD, APPELLANT.
196 N. W. 2d 524

Filed April 20, 1972. No. 38099.

Appeal from the district court for Adams County: FRED R. IRONS, Judge. On motion for rehearing. See 187 Neb. 752, 194 N. W. 2d 183, for original opinion. Motion for rehearing overruled.

Brock & Seiler, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J., dissenting.

I respectfully dissent to the court's failure, on the motion for rehearing, to consider the State's challenge to the requirement in NJI No. 14.52 which requires that a jury must find beyond a reasonable doubt that a defendant's confession was freely, voluntarily, and intelligently made. This instruction is based upon an erroneous statement in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347.

The United States Supreme Court, in the recent case of Lego v. Twomey, Warden, decided January 12, 1972, 404 U. S. 619, 92 S. Ct. 619, 30 L. Ed. 2d 619, held that the hearing on the voluntariness of a confession required by Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, is not designed to implement the presumption of innocence and enhance the reliability of jury verdicts, but to prevent the use of a coerced confession as violative of due process quite apart from its truth or falsity. The Court specifically found that there was nothing in In re Winship, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368, which was inconsistent with this holding.

A confession or its voluntariness is not an element of the crime with which the defendant is charged. The purpose of a voluntariness hearing is not to implement the presumption of innocence but only to determine the confession's admissibility as evidence. It is difficult to understand why a different rule should pertain for the degree of proof necessary to decide the issue of voluntariness of a confession than the degree of proof necessary for the admission of other evidence, and no reason for this discrepancy has ever been advanced in a Nebraska decision. Strict rules pertain concerning search and seizure and also the giving of the Miranda warnings, yet proof of compliance with these rules need be only by a preponderance of evidence even though they pertain, as does the voluntariness of a confession, to whether the evidence was properly or wrongfully obtained.

The admissibility of a confession by a preponderance of the evidence is not a violation of a defendant's constitutional rights, but it certainly is in the public interest, especially in the present day and age.

LLOYD S. WHALEY, APPELLEE, V. MILDRED F. MINGUS, APPELLANT, IMPLEADED WITH G. F. LUTHER, APPELLEE.
196 N. W. 2d 516

Filed April 20, 1972. No. 38144.

1. **Adverse Possession: Property.** It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character.
2. **Adverse Possession: Property: Notice: Time.** The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest.
3. **Adverse Possession: Notice.** To be effective against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Stewart & Stewart, for appellant.

Cook & Cook, for appellee Whaley.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This case involves the ownership of 24.4 acres of land situated in the former bed of the Platte River in Dawson County, Nebraska. The plaintiff claims ownership by accretion to land owned and held under deed, while the defendant Mingus claims ownership of the same land by right of adverse possession. The district court entered judgment quieting title to the land in the plaintiff.

Plaintiff purchased his property in 1948. The defendant and her husband acquired their property in 1943, and defendant is now the owner. The two tracts adjoin. The accretion land involved here lies to the

north of the deeded lands. It is a triangular-shaped tract lying between the surveyed boundary and a line on which the defendant claims to have constructed a fence in the year 1948. The land is not cultivated, but has some brush and trees on it.

Defendant's evidence was that the fence was built with some small posts, one or two strands of used barbed wire, and the wire was nailed to trees where possible. Defendant's evidence was that the fence started some 200 feet north of the north boundary line of the defendant's deeded property and went out northerly to the river, a distance of some 1,500 feet. The defendant's evidence was that the fence was maintained from the time of its construction in 1948 until 1961. Defendant's evidence as to other acts of ownership on the disputed land was that they planted some grass in 1948; pastured sheep in 1950 and 1951 for 2 or 3 hours at a time; cleaned up tin cans and branches at various times; and maintained a duck blind near the northeast corner of the disputed land and hunted from the blind from 1948 on for more than 10 years.

Witnesses for the plaintiff, who were for the most part residents of the immediate area, sharply contradicted the defendant's evidence. Their evidence was that many people used the land for hunting and recreation without asking permission from anyone; that they had not seen any fence, nor could it be seen from the road; and that they had never seen any sheep pastured on the land. One witness, thoroughly familiar with the area, testified that he had trapped, hunted, or seined minnows in the area every year since the year 1949 and was completely unaware of any fence along the line claimed by the defendant.

The plaintiff viewed the land in the fall of 1948 and plaintiff's business manager stated that he had gone into the river bottom in the area after stray cattle on several occasions. Neither of them had ever seen the

fence nor were they aware of the defendant's claim until 1967.

In 1965, the county surveyor made a survey along the fence line claimed by the defendant. He found barbed wire grown into one tree approximately 200 feet northeast of the northeast corner of the defendant's deeded property; one other tree with barbed wire grown into it some 90 feet northeast of the first tree; and a single strand of barbed wire running from that tree approximately 100 feet northeast. He found no evidence of more than a single strand of barbed wire and only at the places indicated.

The district court viewed the premises in 1970 and inspected the fence line claimed by the defendant. He found no sign of any fence closer than 200 feet from the northeast corner of the defendant's deeded land. After the evidence of a former fence extending over approximately 200 to 250 feet as testified to by the county surveyor, the court found no further evidence of any fence from that point to the present flowing stream of the river, some 1,800 feet further to the northeast.

The trial court set out his findings and the evidence in a thorough and detailed memorandum. We think it clear that the critical issue here involves the facts and not the law. The primary test of adverse possession is the actual, continuous, open, notorious, and adverse possession of the property under claimed ownership during the 10-year period required by the statute. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Ordinarily the hidden or remote view or belief of the possessor in taking possession does not relate itself to the adverse character of the possession. Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger

so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Purdum v. Sherman, *supra*.

To be effective against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. Krumwiede v. Rose, 177 Neb. 570, 129 N. W. 2d 491; Mentzer v. Dolen, 178 Neb. 42, 131 N. W. 2d 671.

The determination of the issues here rests primarily upon the facts. The evidence was conflicting. The trial court viewed the premises and saw and heard the witnesses. The record fully supports his determination.

The judgment is affirmed.

AFFIRMED.

VICTOR M. PETERSEN ET AL., APPELLANTS, V. SCHOOL DISTRICT OF BELLEVUE, COUNTY OF SARPY, STATE OF NEBRASKA, APPELLEE.
196 N. W. 2d 510

Filed April 20, 1972. No. 38145.

Eminent Domain: Property: Interest: Constitutional Law: Time. In an eminent domain proceeding, on appeal by the condemner from the award of the county court appraisers, interest is added or allowed only from the date on which the condemner deposited the amount of the appraisers' award and became entitled to enter into possession of the property involved. This is not constitutionally impermissible.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

David S. Lathrop of Lathrop, Albracht & Dolan and Eugene T. Atkinson of Atkinson & Kelly, for appellants.

Dixon G. Adams, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action in eminent domain. Appellee school district condemned a tract of land belonging to appellants. The only issue presented is one regarding interest on the amount of the award. Interest was denied by the district court. We affirm the judgment of the district court.

Petition was filed in the county court on July 3, 1969. An award was made by the appraisers on August 25, 1969, in the sum of $69,000. Condemner appealed to the district court and the verdict of the jury returned on March 25, 1971, was for $58,000. The record does not reflect any deposit made by condemner prior to trial in the district court.

Prior to the adoption of Laws 1951, c. 101, p. 451, we did not have a statute providing for interest on awards made in condemnation proceedings. Prior to the passage of this act, in compliance with accepted rules on the subject, interest was allowed in certain circumstances. In all instances the statute required a deposit of the amount of the appraisers' award before the condemner could take possession. Numerous cases determined that if, on appeal, the verdict of the jury was for a sum in excess of the appraisers' award, interest should be allowed but should not be allowed under other circumstances. See, Grimm v. Elkhorn Valley Drainage Dist., 98 Neb. 260, 152 N. W. 374; Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781. An exception to this general rule appears in Ehlers v. Chicago, B. & Q. R.R. Co., 118 Neb. 477, 225 N. W. 468, where interest was disallowed when the amount of the appraisers' award had been deposited, but the condemnee remained in possession.

It is generally conceded that the recovery of interest is a matter of strict constitutional right. See Annota-

tion, 36 A. L. R. 2d 428. It is also generally conceded that interest must run "from the time of the taking." See Annotation, 36 A. L. R. 2d 443. In regard to the "date or time of taking," there is a considerable divergence in the authorities. See Annotation, 36 A. L. R. 2d 447. Prior to the adoption of our present statute, the Nebraska cases cited above indicated that the "taking" occurred when the eminent domain proceedings were commenced. The Ehlers case, previously cited, was an exception to the general rule. The Nebraska rule diverged from the majority rule which holds that "time of the taking" refers to the time when the condemner actually entered into possession. See Annotation, 36 A. L. R. 2d 451. This is also the federal rule. "In the federal courts interest is usually allowed from the time of the actual taking or entry into possession by the condemnor, unless the rule of the state wherein the land is situated requires the allowance of interest from an earlier time." 27 Am. Jur. 2d, Eminent Domain, § 301, p. 115. See, also, Fibreboard Paper Products Corp. v. United States, 355 F. 2d 752 (9th Cir., 1966); United States v. Mahowald, 209 F. 2d 751 (8th Cir., 1954).

The applicable Nebraska statute, section 76-711, R. R. S. 1943, provides that the condemner shall not acquire any interest in or right to possession of the property until he has deposited the amount of the appraisers' award. It further provides that in the event of an appeal by the condemnee if he succeeds in obtaining an amount greater than the appraisers' award, he shall recover interest from the date of the deposit. If the condemner appeals, interest shall be allowed from the date of the deposit on the amount finally allowed, less interest on that portion of the deposit withdrawn by the condemnee.

It is clear the statute contemplates that the condemner has entered into possession as of the date of the deposit and intends that interest shall be awarded from the time condemnee has been deprived of possession. On

the other hand, it does not provide for the allowance of interest during the period that the condemnee retains possession.

There does not appear to be any valid constitutional objection to the statutory provisions. In Feltz v. Central Nebraska Public Power & Irr. Dist., 124 F. 2d 578 (8th Cir., 1942), it was held: "The Nebraska law that landowner appealing from appraisers' award of damages in condemnation proceeding may not recover interest on verdict of jury which is equal to or less than award of appraisers, is not violative of constitutional requirement that all courts shall be open and every person shall have remedy for injury without denial or delay, and that property shall not be 'taken' or 'damaged' for public use without 'just compensation.'" In United States v. Certain Land in City of St. Louis, Mo., 41 F. Supp. 809 (D. C., 1941), affirmed 131 F. 2d 882, it is held: "The Fifth Amendment to the Federal Constitution guarantees to property owners full compensation for property taken for public use. That the full compensation guaranteed by the Constitution includes interest on the just compensation finally awarded when all or a portion thereof is withheld after the taking is no longer an open question. That full compensation includes the value of the use of the property after the taking and prior to payment therefor. * * * But interest as such is not *added* to value at the time of taking in order to arrive at just compensation subsequently ascertained and paid. Interest is merely the equivalent of the value of a portion of the property taken, in this instance the value of the use of the property at the time it was taken. * * * If the full value is paid at the time of taking, the owner has the use of the money in lieu of the property and no right to further compensation exists." In State, By State Highway Commissioner v. Hankins, 63 N. J. Super. 326, 164 A. 2d 615, it was held: "'Whether interest must be paid on the value of land taken in a condemnation proceeding constitutionally depends on whether there is

a lapse of time between the date of the *actual taking of the property* and the tender of or payment of the value of the property so taken. The amount of interest and when it should be paid in turn depends on specific provisions with respect to interest in a statute or where there is no such provision then on general equitable principles.'" See, also, Central Nebraska Public Power & Irr. Dist. v. Fairchild, 126 F. 2d 302 (8th Cir., 1942); Kirby Lumber Corp. v. State of Louisiana, 293 F. 2d 82 (5th Cir., 1961); United States v. Mahowald, 209 F. 2d 751 (8th Cir., 1954).

Although it is true that a condemnee's use of his property during the pendency of eminent domain proceedings may be somewhat circumscribed due to uncertainty regarding the time when a condemner may deposit the amount of the appraisers' award and enter into possession, he continues to have its use and the rentals therefrom and any additional damages incurred, such as to crops, may be recovered. See Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

In the present instance, the condemner did not deposit the amount of the appraisers' award. The condemnees remained in possession until final judgment was entered on appeal to the district court at which time the judgment was paid in full. The appeal was taken by the condemner. Condemner not having made the deposit or entered into possession, the statute precludes the payment of interest alleged to have accrued prior to entry of final judgment. Condemnees take the position that the statute fails to cover a situation in which no deposit is made and that therefore the court may apply equitable principles in arriving at a solution of this case. We cannot agree with this. The statute allows interest only from the time a deposit is made and if none is made, interest cannot be assessed. To hold to the contrary would constitute judicial amendment and amplifying of the statute which is a legislative prerogative. Further-

more, if the statute is to be disregarded, then we fall back on the situation formerly presented at a time when there was no Nebraska statute on the question of interest. The cases decided during that period unanimously disallowed interest when, as here, the condemnees failed to obtain a greater sum on the appeal.

This court has stated that when a condemner makes a deposit in court, the amount of such payment constitutes a fund which is deemed a *substitute* to the owners for the land *of which they have been deprived* and for their damage. See Blecha v. School Dist. of Hebron, 173 Neb. 183, 112 N. W. 2d 783. Under the statute entry cannot occur until the deposit is made and until this occurs, the owner has not been deprived of his property. There is simply a procedure pending which will eventually result in such deprivation.

The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion dismisses the constitutional issue of just compensation by indirectly overruling all the past Nebraska cases, without mentioning them, which have uniformly held that the "taking" is deemed to occur at the time the petition for condemnation is filed. The majority opinion now holds, in effect, that there is no "taking" until a condemner actually enters into possession. The majority opinion then states: "Condemner not having made the deposit or entered into possession, the statute precludes the payment of interest." It is quite clear that, statute or no, something in the nature of interest must be included in a condemnation award in order to produce the full equivalent of the value of an award paid contemporaneously with the taking. This is without question the overwhelming general rule. See cases cited in Annotation, 36 A. L. R. 2d 413 and 443.

As this court said in a case similar to this where the condemner did not make any deposit: "* * * the owner

is entitled to interest on the amount of the compensation from the taking no matter whether the verdict of the jury is larger or smaller than the award of the appraisers and no requirement rests upon the owner to make demand for such deposit or to take any action requiring such deposit to be made to entitle him to interest thereon." Langdon v. Loup River Public Power Dist., 144 Neb. 325, at page 335, 13 N. W. 2d 168.

The only case found which directly considered the specific issue involved here is Central Nebraska Public Power & Irr. Dist. v. Fairchild, 126 F. 2d 302. That case was cited with approval in Langdon v. Loup River Public Power Dist., *supra*.

The court in Fairchild said: "The constitutional provision prohibiting the taking or damaging of private property for the public use without just compensation does not of itself suggest procedure for the taking of private property for such uses. That has evolved in Nebraska from the statute and from the decisions which firmly establish that for the purpose of assessing damages the 'condemnation' or 'taking' is deemed to occur at the time the petition for condemnation is filed."

The court in Fairchild specifically rejected the argument, now adopted by the majority opinion here, that interest should not commence until the time of entry into possession by the condemner. Both the majority opinion and the dissent in Fairchild agreed that interest must be allowed from the date the petition for condemnation is filed but disagreed only as to the proper rule to be applied in requiring the condemnee to account for the use of the property during the time he retained possession. The majority held that the actual amount of rentals received by the landowner during the pendency of the appeal should be offset against the interest allowed while the dissent determined that the landowner ought to be required to account for the reasonable value of the use of the property during the time of retained possession and not simply for such rental payments as

he had actually collected. As Judge Johnson said in the dissent: "The allowance of interest in a condemnation case in Nebraska is not a fixed statutory right, but simply a means of insuring 'just compensation' to the property owner. The only thing for which it can reasonably be held to constitute compensation is a deprivation of the use of the property or of the funds substituted for the property, during the condemnation litigation period."

In this case, the tract of land condemned was held for development and was not rented or used during the litigation period. The filing of the condemnation action effectively stopped all uses to which it might otherwise have been put and there was no evidence that its use had any reasonable value during the period of litigation. All of the expert testimony as to value was as of the date of filing the petition for condemnation. In spite of that fact, the majority opinion now holds that the "taking" as to which all of those witnesses were testifying, did not occur until the condemner might decide to enter into possession or until the final verdict of a jury might be entered on appeal. That is clearly a violation of the constitutional mandate that "the property of no person shall be taken or damaged for public use without just compensation therefor." The absence of a statute which specifically authorized interest was wholly immaterial. It should be noted also that the statute itself has now been changed to require deposit within 60 days from date of award of appraisers, and it entitles the condemnee to interest from date of deposit, where the appeal is by the condemner. § 76-711, Laws 1971, L. B. 191, § 1. There is even a serious question as to whether that statute by its own terms is applicable to pending appeals such as this one.

The judgment should have been reversed, and the condemnees should have judgment for the amount of the award with interest from the date the petition for condemnation was filed.

SMITH and CLINTON, JJ., join in this dissent.

FIRST NATIONAL BANK OF BELLEVUE, A BANKING CORPORATION, APPELLEE, V. GEORGE P. ROSE ET AL., APPELLANTS.

196 N. W. 2d 507

Filed April 20, 1972. No. 38159.

1. **Trial: Evidence: Sales: Contracts: Security Interest.** Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable.
2. **Trial: Evidence: Pleadings.** A general denial is available to a defendant to challenge one or more of the elements essential to a recovery by the plaintiff and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied.
3. ———: ———: ———. Where an answer to a petition consists of a general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition. For such purposes, no other allegations in the answer are necessary.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded for further proceedings.

Ralph R. Bremers and George T. Burr, for appellants.

Keith I. Frederick of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is an action to recover a deficiency judgment for the balance due on a secured promissory note of the defendants, after a sale of the collateral security. The district court sustained plaintiff's motion for a directed verdict and entered judgment against the defendants for $9,422.88.

In April 1969, the First National Bank of Bellevue

consolidated two existing loans to defendants and advanced additional cash. The secured note was for $22,200. The security agreement covered various pieces of equipment, including tractors, vehicles, and trailers. Three monthly payments of $2,000 each were made. After default, the plaintiff replevined the equipment and disposed of it at private sale, after notice to the defendants. Following sale and disposition of the collateral, the plaintiff credited the sum of $10,268.50 on defendants' indebtedness.

Plaintiff's petition here set forth essentially those facts. Paragraph VII of the petition specifically alleged that $10,268.50 was the fair and reasonable value of the collateral. The petition prayed for attorneys fees and expenses in accordance with the security agreement and for judgment for the balance due on the note. When the jury trial began, the amount allegedly due was $9,422.88. The defendants' answer was a general denial of each and every allegation of the plaintiff's petition.

The plaintiff's evidence as to the value of the equipment sold at the private sale was largely undisputed except as to one 1959 Freuhauf platform flatbed trailer. Evidence as to that piece of equipment was confusing, to say the least. The flatbed trailer was on the equipment list attached to the financing statement and security agreement. It is not listed on the face of the judgment in the replevin action. There is evidence that a representative of the plaintiff at one point estimated the value of the trailer at $500. The defendant, George Rose, testified that its value was $1,000. The trailer is not specifically accounted for on any record of the sale. Plaintiff's witness conceded that the trailer had been repossessed but could not clearly account for it. In other testimony by that witness, he said: "I guess that trailer was thrown into the hopper." That same witness had assigned a value of $3,836.01 to two tractors. He finally testified that the tractors together with the trailer brought only $3,000 at the sale, but the plaintiff

credited the defendants with $3,836.01, the value of the two tractors.

The trial court took the position that inadequacy of price at the private sale of the collateral was not in issue under a general denial but was instead a matter of affirmative defense which had not been pleaded. However, the defendant Rose was permitted to testify as to the flatbed trailer. At the close of all the evidence, the court granted plaintiff's motion for directed verdict.

Section 9-504(3), U. C. C., provides in part: "Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."

Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable.

The first sentence of section 9-507(2), U. C. C., indirectly supports that conclusion: "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." See, also, 64 Northwestern University L. Rev. 808, at p. 820. The plaintiff recognized the burden resting on it under the terms of the Uniform Commercial Code and affirmatively pleaded that the sale price was the fair and reasonable value of the collateral. To establish that every aspect of the sale was commercially reasonable was essential to plaintiff's case, and the issue was clearly within the pleadings.

The question remains as to whether or not evidence of inadequacy of price, or lack of proper credit on the indebtedness was admissible under a general denial. A general denial is available to a defendant to challenge

one or more of the elements essential to a recovery by the plaintiff, and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied. Master Laboratories, Inc. v. Chesnut, 154 Neb. 749, 49 N. W. 2d 693.

Where an answer to a petition consists of a general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition. For such purposes, no other allegations in the answer are necessary. Alberts v. Pickard, 148 Neb. 764, 29 N. W. 2d 382; Ehlers v. Church of God in Christ, Inc., 173 Neb. 670, 114 N. W. 2d 716.

Here there was a flat contradiction in the testimony as to the value of the flatbed trailer together with no record of its sale and no evidence of the specific amount of credit allowed for it, if any. Under such circumstances, there was a factual issue which required submission to the jury. In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. SAM L. SIMMONS, APPELLANT.
196 N. W. 2d 499

Filed April 20, 1972. No. 38255.

1. **Criminal Law: Arraignment: Guilty Plea: Records.** The record of the arraignment at which a plea of guilty is entered must show that the court determined there was a factual basis for the plea.
2. **Criminal Law: Arraignment: Guilty Plea.** The standard for

determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.

Appeal from the district court for Douglas County: Donald Brodkey, Judge. Affirmed.

William J. Riedmann, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an appeal from a judgment and indeterminate sentence of 2 to 4 years in the Nebraska Penal and Correctional Complex on a guilty plea to a charge of grand larceny. The assignment of error generally is that the record fails to affirmatively show the defendant pled guilty voluntarily, understandingly, intelligently, and with full knowledge of the rights which he was waiving by his plea. We affirm the judgment and sentence of the district court.

There is no dispute between the parties as to the law that covers this case. Quite similar contentions to the ones made in this case were made in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. The argument there, as here, was based essentially upon the holding of the United States Supreme Court in Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. We held in Turner that the proper interpretation of Boykin is that the court cannot presume a waiver of federal constitutional rights from a silent record. We said that Boykin requires a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. In Turner we specifically held as follows: "The criteria is whether or not the defendant understands the relevant factors involved in

a guilty plea. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea." We also said in Turner as follows: "The standard for determining the validity of guilty pleas is enunciated as follows in North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162: 'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'"

The record in this case reveals an exhaustive and conscientious application of the principles and standards required in State v. Turner, *supra*. The court at the arraignment inquired as to the defendant's understanding of the nature of the offense and received a definite positive reply after the court had carefully explained the elements of the charge following a reading of the information. The court carefully explained "aiding and abetting" when the county attorney informed the court that it was possibly involved. The defendant at all times was represented by counsel and there is no contention in this case of inadequate representation. The court carefully explained the various pleas the defendant could make, including his right to remain silent and his various constitutional rights. With counsel present, the defendant stated that he understood his rights and the pleas that were open to him. He further stated that no force or threat had been used upon him nor had any promises been made to him in order to secure his plea. The court even inquired as to plea bargaining and was advised that there had been only unsuccessful plea bargaining. This statement was agreed to by the defendant. The court, in this case, even went so far as to explain to the defendant that if he pled not guilty he would be entitled to have a speedy public trial, the nature of a jury trial, the requirement of a unanimous vote to convict him, the protection of the presumption

of innocence, the right to be represented by an attorney at all times, the right of confrontation, the right not to testify or incriminate himself by his own testimony, the right to State process to procure witnesses, a full explanation of the term "aiding and abetting," an explanation of the meaning of the waiver of all these rights, and a specific inquiry as to whether he understood all of these rights. The court also interrogated the defendant's counsel in the course of the proceedings. The record reveals that a careful description of the penalties involved was made and the procedure of the court before determining the amount of the sentence, including a description of a presentence investigation.

The record here conclusively shows that at the arraignment at which the defendant pled guilty the court made proper inquiry and determined that there was a factual basis for the plea of guilty under the holding in State v. LeGear, 187 Neb. 763, 193 N. W. 2d 763. The court specifically told the defendant that "before I accept your plea of guilty, I want to ascertain if there is a factual basis for the plea * * *." Only a part of the colloquy resulting from this statement is recited herein in the interest of brevity. The record shows as follows:

"THE COURT: I just want to make sure you are under law guilty of aiding and abetting or whatever was involved.

"DEFENDANT: I took the money.

"THE COURT: You took the money from where?

"MR. RYDER: It was down at Tall Togs.

"THE COURT: I don't have the name.

"MR. RYDER: Tall Togs, it is a clothing store.

"THE COURT: Was that Jerry Leonard's?

"MR. RYDER: It is right down on 14th Street.

"THE COURT: Well, Mr. Breit, as counsel for the defendant and knowing the facts of this case as related to you and probably in more detail than I have had it here, and also whatever information you have been able to ascertain by your own investigation or that of

your office, is it your considered judgment and opinion that a plea of guilty to the charge of grand larceny by Mr. Simmons, your client, here today is warranted and justified?"

The contentions of the defendant are wholly without merit. This record affirmatively demonstrates that the plea of guilty herein was entered voluntarily and intelligently within the meaning of Boykin and Turner.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS W. ZOLLARS, APPELLANT.
196 N. W. 2d 521

Filed April 20, 1972. No. 38343.

Criminal Law: Appeal and Error. Relief cannot be granted on appeal when it is frivolous and completely lacking in merit.

Appeal from the district court for Butler County: HOWARD V. KANOUFF, Judge. Affirmed.

Dennis W. Zollars, pro se.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

WHITE, C. J.

The defendant, Dennis W. Zollars, asserts excessiveness of a 3-year sentence, for making, drawing, uttering, and delivering a bank check when he knew he did not have an account in or a deposit in the bank upon which he drew such check.

The defendant pled guilty to the charge and the record reveals a careful protection of the defendant's rights

and a plea completely voluntary in nature. The defendant does not contend otherwise. The record also reveals that on July 23, 1971, the defendant had committed another like offense for which he was found guilty in the district court for Platte County, Nebraska, and that the present charge of issuing a no-account check is a second offense.

It is clear that the sentence imposed was within the limits provided by law and there is nothing in the record to show that the court abused its discretion in imposing the sentence that it did. On the contrary, the record affirmatively shows that within a short period of time after having written a no-account check, the defendant repeated the offense in another county with no circumstances being shown by way of justification.

The defendant apparently contends now, after the sentence has been imposed, he was under the impression the court ruled that he be eligible for parole after serving 1 year of the sentence. Eligibility for parole, of course, is not within the jurisdiction or the discretion of the sentencing judge. The record of the sentence imports absolute verity and reads as follows: "The Court: Then, Mr. Zollars, the Court accepts your plea of guilty, and it is the order and judgment of this Court that you be confined and sentenced to the Nebraska Penal and Correctional Complex for a term of three years at hard labor, except for Sundays and holidays; and that no part of said sentence shall be in solitary confinement or upon bread and water. You are remanded to the sheriff to be taken to the complex as provided by law.

"The Witness: Yes, sir."

The sentence imposed is clear and unmistakable and there is utterly no merit to the defendant's contention. In State v. Moore, *ante* p. 104, 195 N. W. 2d 253, this court recently held that relief cannot be granted on appeal when it is frivolous and completely lacking in merit.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLYDE WEST ET AL., APPELLANTS.
196 N. W. 2d 514

Filed April 20, 1972. No. 38353.

1. **Criminal Law: Statutes: Motions, Rules, and Orders: Administrative Law.** A criminal prosecution cannot be maintained under a statute requiring a permit to be obtained from the Department of Environmental Control "as required by it," i.e., the department, in the absence of rules, regulations, or standards fixing the circumstances under which such a permit is to be "required."
2. **Criminal Law: Statutes.** A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellants.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendants have been convicted of engaging in the construction of a sewer disposal system without obtaining a permit therefor from the state Environmental Control Council. We reverse the judgment of the district court.

Plans for the disposal system were submitted to the council and, after suggested revisions were made, ap-

proved. No permit was issued, but after institution of this prosecution, a letter was written approving the project plans and stating that the letter of approval should be considered a "permit."

Prior to the commencement of this prosecution, it was not the practice of the council to issue permits nor had it adopted any rules or regulations governing or setting standards for the construction of sewage disposal units. Neither had it, by rule or regulation, provided for the issuance of permits or set out the circumstances under which they would be required. The present act, Chapter 81, article 15, sections 81-1501 to 81-1532, R. R. S. 1943, supplants and combines the duties formerly allotted to the Air Pollution Control Council, Water Pollution Control Council, and Department of Health. By virtue of section 81-1505 (5), R. R. S. 1943, the State contends that the rules adopted by these organizations become the rules of the state Department of Environmental Control. We cannot agree. That section adopts only *"standards of quality* of air, waters or land." (Emphasis supplied.) Furthermore, this record fails to reflect the existence of *any* rules or regulations.

The statute under consideration, section 81-1506 (2), R. R. S. 1943, provides: "It shall be unlawful for any person to carry on any of the following activities unless he holds a *current permit therefor from the council, as is required by it,* for the disposal of all wastes which are or may be discharged thereby into the air, waters or land of the state:

"(a) The construction, installation, modification or operation of any disposal system or part thereof or any extension or addition thereto; * * *." (Emphasis supplied.)

It will be noted that one constructing a disposal system must hold "a current permit therefor from the council, *as is required* by it." (Emphasis supplied.) In the complete absence of rules or regulations of the coun-

cil requiring a permit and fixing standards or conditions under which it must be obtained, it is apparent that the statute is not applicable and has never been activated.

Furthermore, in the absence of standards of the council clearly defining when, under what conditions, and for what purposes a permit shall be required, the law is too vague and uncertain to support a criminal prosecution. The council may see fit to exempt certain types of projects or minor extensions. "A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder." State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. CLAIRE, APPELLANT.
196 N. W. 2d 519

Filed April 20, 1972. No. 38383.

1. **Criminal Law: Trial: Conspiracy: Evidence.** A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.
2. **Criminal Law: Trial: Conspiracy: Intent.** Participation in criminal intent may be inferred from presence, companionship, and conduct.
3. **Criminal Law: Sentences: Appeal and Error.** This court will not interfere with a sentence imposed by a lower court unless it appears to be the result of an abuse of discretion.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Eugene T. Atkinson of Atkinson & Kelly, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SPENCER, J.

Defendant, Robert D. Claire, appeals from his conviction on three counts of burglary. He was sentenced to 3 years on each count, the sentences to run concurrently. We affirm.

Defendant was observed in a white Ford Maverick automobile in the east parking lot behind the approximate center of the Southroads Shopping Center in Sarpy County, at approximately 4:30 a.m., on the morning of March 9, 1971. When an officer drove up, the car left the shopping center and the officer followed and stopped it. When the defendant could not produce a driver's license or a registration for the car, he was placed under arrest. John Pakolnis was in the car with the defendant at the time. The two men were taken to the Bellevue police station, searched, and booked.

A check at the shopping center revealed that three stores, Woolworth's, Music Land, and Calandra's, had been forcibly entered. Some suitcases, television sets, and stereo cartridges were found stacked together on the floor in Music Land. Merchandise taken from Woolworth's was found in the suitcases. Under an opening in the ceiling of the mall, between two of the establishments, the officers found several .22-caliber bullets lying on the floor. Bullets of the same type and brand were found in the coat pocket of Pakolnis, as well as in a Kleenex box which was on a shelf under the dash in the center of the automobile being operated by the defendant. Defendant also had in his possession a pocket knife of a type sold exclusively by Woolworth's. Some 12 hours after the defendant's apprehension, a torn cardboard knife carton was found in the store, in the vicinity where the knives were displayed. A cash

register key, taken from Woolworth's, and used to open cash registers in the Woolworth store, was found in Pakolnis' possession.

Defendant assigns as error: (1) The insufficiency of the evidence to sustain the verdict; (2) the introduction of the knife carton; (3) the giving of an instruction on aiding and abetting; and (4) the excessiveness of the sentence.

The defendant was observed by the police in the immediate vicinity of the places burglarized at 4:30 a.m. He had a small pocket knife in his possession at the time of his arrest, which was of a type sold exclusively by Woolworth's. Several .22-caliber shells, of the exact type scattered on the floor of the mall in the shopping center, were found in his possession in the car. His companion had some of these same shells in his pocket, and also had a key taken from Woolworth's which opened cash registers at that establishment. The evidence was ample to warrant the submission of the case to the jury.

The torn cardboard knife carton, on the record herein, was properly received in evidence. Woolworth's opened for business routinely that morning. At approximately 4 or 5 p.m., when the officer made the inspection of the area where the knives were displayed, he found the torn knife carton on the floor in the immediate area where the knives were displayed. It is reasonable to believe the knife found in defendant's possession came from the carton in evidence.

The instruction on aiding and abetting was proper. The defendant and Pakolnis were observed parked together, behind the shopping center, immediately before defendant's apprehension. There can be little question that Pakolnis, who subsequently pled nolo contendere, had been in the burglarized establishments. Whether defendant actually entered the three establishments can only be inferred from the evidence, but there cannot be the slightest doubt defendant was with Pakolnis near

the scene. The evidence was also sufficient to permit the jury to find the defendant had some of the merchandise taken in his possession. This amply sustains the giving of an instruction on aiding and abetting. In Miller v. State, 173 Neb. 268, 113 N. W. 2d 118, we said: "A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.

"Participation in criminal intent may be inferred from presence, companionship, and conduct * * *."

The sentence is not excessive. Defendant was convicted on three counts of burglary and sentenced to serve concurrent terms of 3 years on each count. From the record, it is evident that there was also another charge pending. The sentence is a modest one under the circumstances. As we said in State v. Duitsman, 186 Neb. 39, 180 N. W. 2d 685: "This court will not interfere with a sentence imposed by a lower court unless it appears to be the result of an abuse of discretion." There definitely was no abuse of discretion herein.

Defendant's assignments of error are without merit. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HUBERT W. FINCHER, APPELLANT.
196 N. W. 2d 909

Filed April 27, 1972. No. 38122.

Criminal Law: Sentences: Appeal and Error. A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Douglas County. JOHN E. MURPHY, Judge. Affirmed.

Hubert W. Fincher, pro se.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

CLINTON, J.

The defendant was convicted by a jury of the crime of assault with intent to commit great bodily injury committed on September 29, 1970. He was sentenced to a term of 15 to 20 years. He appeals pro se and the sole assignment of error is that he received a sentence in excess of the maximum provided by statute. He points to section 28-413, R. R. S. 1943. He overlooks that in 1969 the Legislature amended that statute to provide for a penalty of "not less than one year nor more than twenty years." § 28-413, R. S. Supp., 1969. The assignment of error is not well taken.

If the defendant had been represented by counsel on this appeal a specific assignment of excessiveness of sentence would no doubt have been made, and since this appears to be the defendant's real complaint we treat his assignment of error as raising the question of excessiveness of sentence and have accordingly carefully reviewed the record.

The evidence of the defendant's guilt is largely circumstantial but quite conclusive. The crime was witnessed but the witness was not able to see the face of the defendant, only the wrist and the hand, the weapon, and the striking. The crime itself was a brutal one involving an apparently unprovoked assault with a hammer upon a man 80 years of age. The victim died. The defendant is of the age of 60 years. He took the stand in his own behalf. His explanation of the blood on his clothing is not convincing. He admits three prior felony convictions. The court did not abuse its discretion in imposing a sentence of 15 to 20 years.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DIANE CRAWFORD, APPELLANT.

196 N. W. 2d 915

Filed April 27, 1972. No. 38138.

1. **Criminal Law: Parent and Child: Negligence: Homicide.** A person who has the care, custody, or control of a child and causes the death of the child by willfully or negligently causing or permitting the life of the child to be endangered is guilty of manslaughter.
2. ———: ———: ———: ———. A parent who negligently or willfully fails to obtain medical aid for a child, thereby causing his death, is guilty of manslaughter.
3. **Criminal Law: Instructions: Negligence.** An instruction that criminal negligence or culpable neglect is not a slight breach of duty but a gross failure to do what is required is not prejudicially erroneous.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison, Sr., Bennett G. Hornstein, and Stanley A. Krieger, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant, Diane Crawford, appeals from a conviction for manslaughter. She contends the evidence was not sufficient to sustain the conviction; the trial court erred in admitting evidence and instructing the jury; and the sentence was excessive.

The defendant and Gene Crawford were married on December 1, 1969. Their son, Gene Crawford, Jr., born August 27, 1970, died on January 5, 1971, from malnutrition and dehydration. As a result of his death the defendant was charged with manslaughter. The State contends that the death was caused by the failure

of the defendant to provide proper food and medical care for her son.

At about 1 a.m., on January 5, 1971, Tyrone Parker, a friend of the defendant, called for an ambulance to take Gene Crawford, Jr., to the hospital. The child was taken to Immanuel Medical Center where he was examined by Dr. Donald Andrew Harvey. The child was gravely ill and at first was thought to be dead. He had a depressed temperature, no respiration on arrival, and a depressed heart rate. There were no reflexes. He weighed 6 pounds 10¼ ounces, or about 63 percent of normal weight. The head seemed large in proportion to the body. The extremities were very thin. His eyes were sunken. There was no subcutaneous tissue and all of the ribs could be made out in great detail. The child was placed in an isolette, oxygen was administered, and intravenous fluids were introduced through both ankles. At about 4 a.m. the child was taken to Children's Hospital where there was an intensive care ward for pediatric cases.

At Children's Hospital the child was examined by Dr. Abel Paredes. His heartbeat was irregular and his respiration was very slow. Two photographs of the child were taken at about 5 a.m. The child showed improvement at times but was pronounced dead at 7:45 a.m.

An autopsy was performed that same day at University Hospital by Dr. Blaine Roffman. The autopsy revealed that many of the internal organs weighed but a small fraction of their normal weight. The liver weighed 37 grams as compared to a normal weight of 160 grams. The kidneys weighed 11 grams each as compared to a normal weight of 21 or 22 grams. The spleen weighed 4 grams as compared to a normal weight of 16 grams. The autopsy disclosed no abnormality which could have caused the malnutrition. The cultures and microscopic examinations made were negative. The dehydration was a result of malnutrition

which had developed over a long period of time.

Gene Crawford, Jr., at birth weighed 6 pounds 3 ounces. When weighed at Immanuel Medical Center he weighed only 7¼ ounces more than his birth weight. His normal weight would have been 10 pounds or more. The photographs depict a child who is severely emaciated and obviously very ill. Despite the defendant's testimony and evidence to the contrary, the jury could have found that the condition had developed over a period of many weeks.

It is unlawful for a person having the care, custody, or control of a child to willfully or negligently cause or permit the life of the child to be endangered. § 38-116, R. R. S. 1943. The death of a child resulting from a violation of the statute is punishable as manslaughter. § 28-403, R. R. S. 1943; Delay v. Brainard, 182 Neb. 509, 156 N. W. 2d 14.

The father of Gene Crawford, Jr., was in the penal complex. The defendant had the sole care, custody, and control of Gene Crawford, Jr., and it was her responsibility to obtain adequate food and proper medical care for her son. A parent who negligently or willfully fails to obtain medical aid for a child, thereby causing his death, is guilty of manslaughter. Stehr v. State, 92 Neb. 755, 139 N. W. 676.

The record shows that a representative of the Douglas County social services contacted the defendant before the birth of Gene Crawford, Jr., and offered to assist the defendant in obtaining prenatal care and aid to dependent children. This evidence was admissible for the purpose of showing that assistance was available to the defendant if she was unable to provide food or medical care from her own resources.

The defendant contends that the trial court should have defined culpable negligence as a reckless, wanton disregard for the safety of others. In instruction No. 17 the trial court advised the jury that criminal negli-

gence or culpable neglect was "not any slight breach of duty but rather a gross failure to do what is required of one." The instruction conformed to the standards expressed in Stehr v. State, *supra,* and Delay v. Brainard, *supra,* and was not prejudicially erroneous.

The defendant contends that the sentence of imprisonment for 10 years, the maximum provided by statute, was excessive. In determining this question we consider both the circumstances of the case and the previous record of the defendant.

When Gene Crawford, Jr., died he was nearing the third stage of malnutrition. The condition had developed over a long period of time, but he had never been taken to a doctor since his birth. The record is devoid of any explanation why the defendant failed to obtain medical care for her child when it was obvious that the child was gravely ill.

The presentence report shows the defendant is 20 years of age. Her juvenile record began in 1965. She was committed to the Girls' Training School in 1967 and again in 1969. At the time of this offense she was on probation for burglary. The record fails to show that the sentence was excessive.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARRY RYAN, APPELLANT.
196 N. W. 2d 919

Filed April 27, 1972. No. 38248.

1. **Trial: Appeal and Error: New Trial.** In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.
2. **Criminal Law: Verdicts: Appeal and Error: Evidence.** In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in pro-

bative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Harry Ryan, pro se.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

NEWTON, J.

This is an appeal from a conviction for burglary. The sole assignment of error is that the evidence is insufficient to sustain the conviction. We affirm the judgment of the district court.

A motion for new trial was not filed in this case. "In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon." State v. Stanosheck, 186 Neb. 17, 180 N. W. 2d 226. See, also, Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853.

A review of the record in this case reveals ample evidence to sustain the verdict of guilty. "In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Goodwin, 184 Neb. 537, 169 N. W. 2d 270.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE DOUGLAS NERO, APPELLANT.
196 N. W. 2d 913

Filed April 27, 1972. No. 38252.

Criminal Law: Witnesses: Trial: Evidence. Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Frank B. Morrison, Sr., and Stanley A. Krieger, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SMITH, J.

An information charged that Lawrence Douglas Nero had feloniously entered a dwelling in Omaha at night with intent to rob Richard Paul Floen. A jury found him guilty. On appeal the question relates to a pretrial identification by Floen from an exhibit of photographs by a police officer. The identification procedure, Nero contends, was so suggestive that the in-court identification of him by Floen constituted prejudicial error.

Floen was alone at home on December 2, 1970, when he admitted a black female whom he knew. At 8:30 p.m. and upon the ringing of the doorbell, the girl opened the door. Two black males who were strangers to Floen entered. Seizing a telephone, water pitcher, and picture frame, they beat Floen upon the top of his head 20 or 25 times. Floen suffered 4 head wounds that bled. The struggle lasted 10 minutes. The black males then departed in an automobile. Floen noted

the license number which he reported to the police department. The automobile was owned by Nero.

Police Sergeant Raymond Holewinski testified as follows. Nero and a companion, Roscoe Bolden, ages 22, were arrested on December 2, 1970, at 11 p.m. After the arrest Floen, who had been hospitalized, was interviewed by Holewinski. The latter informed Floen that Nero, the owner of the car, was in custody, and that he would return with photographs of the two suspects in custody. At the police station two photographs were taken of each man. Holewinski knew that Nero wore prescription sunglasses, and for one photograph Nero posed wearing them. Holewinski, because of an erroneous estimate of age, obtained three photographs of men in the 25 to 30 age group from the police files.

Holewinski, according to his testimony, returned to the hospital with the seven photographs randomly mixed. Floen had said he was certain he could positively identify the first man who had entered his house. From one of the photographs Floen identified Nero, but he could not identify anyone else. Holewinski did not recall which photograph Floen had selected.

Floen testified that only one of the two black males had been wearing sunglasses, and that he was the second male to enter the house. The only basis of his identification was Nero's face. The sunglasses had fallen to the floor during the struggle. They were not prescription glasses. At the hospital Holewinski gave him five photographs to examine. In the one he selected Nero was wearing sunglasses. Nero had been the second man to enter the house. Floen was the only witness to identify Nero. His testimony in many respects was vague and contradictory. On the whole, however, he repeatedly and positively testified that he based his in-court identification on having seen Nero in his home and not on the photographs.

Part of the foregoing summary was taken from a proceeding prior to the commencement of the prosecu-

tion's case-in-chief. The balance was taken from testimony before the jury, the testimony covering the photographic identification. In the first proceeding the court had overruled a motion to exclude an identification by Floen in the presence of the jury. The judge remarked that he was looking not only at the pictures of Nero and Bolden but also at the pictures of the 25 to 30 age group. All appeared to him to be in the same age group. Only the four pictures of Nero and Bolden were incorporated in the record for us to review.

Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Each case must be considered on its own facts. Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. Moss, 187 Neb. 391, 191 N. W. 2d 543 (1971); State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225 (1971).

The district court rulings challenged by Nero were not prejudicially erroneous. The judgment is affirmed.

AFFIRMED.

MARINE EQUIPMENT AND SUPPLY CO., A NEBRASKA CORPORATION, APPELLEE, V. DON WELSH, APPELLANT.
196 N. W. 2d 911

Filed April 27, 1972. No. 38263.

1. **Landlord and Tenant: Forcible Entry and Detainer.** A tenant possesses a right to a demand for payment of rent and to a reasonable opportunity to pay. There must be a neglect or refusal on his part before the landlord may claim a forfeiture of the lease or a judgment of ouster for nonpayment of rent.
2. **Landlord and Tenant: Forcible Entry and Detainer: Equity: Statutes.** Equity considers statutory provisions concerning non-

payment of rent to secure the rent and not to forfeit the lease, provided that the tenant acts in good faith and pays promptly on demand.

3. ———: ———: ———: ———. Defenses in forcible entry and detainer actions may be equitable. The tenant will be relieved from a technical forfeiture in circumstances in which absolute good faith is shown and the exercise of equitable principles in his behalf is necessary that gross injustice may be prevented.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Leamer & Galvin and John C. Baker, for appellant.

Smith, Smith & Boyd, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SMITH, J.

The district court on appeal from county court found Don Welsh guilty of unlawful and forcible detention of business premises for nonpayment of rent. It ordered restitution to Marine Equipment and Supply Co. Welsh appeals. He contends that nonpayment of rent under the circumstances constituted no ground for eviction.

On April 1, 1969, Marine verbally leased premises in South Sioux City to Welsh for a month-to-month term. The rent was to be $175 a month payable in advance on the first of the month and the cost of utilities. The utilities were metered separately, billed shortly after the first of each month of use, and due when billed. Billings ordinarily were made not later than the 10th of the month. Welsh operated a beauty shop on the premises.

In the first part of December 1970, Welsh had paid the $175 part of the rent and the utilities to December 1, 1970. Marine timely billed Welsh for the December and January utilities in the sums of $69.34 and $67.96. On February 26, 1971, Marine served Welsh with a 3-day notice to quit the premises. After service of the

notice but on the same day Welsh tendered the $69.34 and $67.96. At this time Welsh had paid the $175 sums at due date. Marine refused that tender and a subsequent tender of $175 for March rent. Marine commenced the forcible detention action against Welsh in county court on May 3, 1971. Prior to trial Welsh tendered payment of all sums due, but Marine refused the tender. Welsh offered no excuse for his dilatoriness.

Welsh argues as follows. Acceptance of the rent check of $175 for February waived the default in payment of the bills for December and January utilities. Marine failed to demand payment prior to service of the 3-day notification so that the notification was simply a demand for payment. Marine acquiesced by failing to prosecute diligently after service of the 3-day notice.

A tenant possesses a right to a demand for payment of rent and to a reasonable opportunity to pay. There must be a neglect or refusal to pay on his part before the landlord may claim a forfeiture of the lease or a judgment of ouster for nonpayment of rent. Equity considers statutory provisions for forfeiture for nonpayment of rent, to secure the rent and not to forfeit the lease, provided that the tenant acts in good faith and pays promptly on demand. §§ 26-1,119 and 27-1402, R. R. S. 1943. Defense in forcible entry and detainer actions may be equitable. The tenant will be relieved from a technical forfeiture in circumstances in which absolute good faith is shown and the exercise of equitable principles in his behalf is necessary that gross injustice may be prevented. See Farmer v. Pitts, 108 Neb. 9, 187 N. W. 95, 24 A. L. R. 719 (1922).

A practice of payment of rents at irregular periods of time may constitute a waiver by conduct of the parties. Goetz Brewing Co. v. Robinson Outdoor Advertising Co., 156 Neb. 604, 57 N. W. 2d 169 (1953).

The difficulty with the argument of Welsh lies in the facts. The premises were not used for residential purposes. The billings for utilities constituted demands

for payment. The lapse of time between service of notification and commencement of action without more did not constitute acquiescence on the part of Marine. There is no evidence that Welsh relied on the interval to his detriment. The facts are insufficient for a finding of waiver by conduct of the parties. The position of Welsh is without equity.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARDELL NELSON SMITH, APPELLANT.
196 N. W. 2d 918

Filed April 27, 1972. No. 38269.

Post Conviction: Motions, Rules, and Orders: Pleadings. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Wardell Nelson Smith, pro se.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SPENCER, J.

This is a post conviction action to vacate and set aside defendant's sentence and conviction for first degree murder. Defendant pled guilty and was sentenced to life imprisonment. The trial court appointed counsel,

granted defendant a hearing, and decided the case on its merits.

This, however, is a second motion for post conviction relief on behalf of the defendant. In State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826, we held: "After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief." We see no reason to depart from that holding in this case.

The judgment of the district court is affirmed.

AFFIRMED.

A. RICHARD WEINER ET AL., APPELLEES, V. ROBERT T. HROCH, APPELLANT.
196 N. W. 2d 907

Filed April 27, 1972. No. 38287.

1. **Contracts.** The rule that mutuality is an essential element of an executory contract is not applicable to executed contracts or where the party not bound has performed its conditions.
2. **Contracts: Deeds.** It is the general rule that for most purposes when a deed is made in execution of a contract of sale, the provisions of the contract are merged in the deed.
3. **Deeds: Property: Evidence.** The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.
4. **Contracts: Deeds: Mortgages: Evidence.** An agreement to pay an existing mortgage, as part of the consideration for a conveyance of mortgaged premises, need not be inserted in the deed, neither must it necessarily be in writing. Such an agreement is an independent undertaking of the party making it, the conveyance affording sufficient consideration to sustain it when its existence is established by a preponderance of evidence.
5. **Trial: Evidence: Appeal and Error.** It is not the province of

this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

John Stewart Barrett and Spielhagen, Matejka & Spielhagen, for appellant.

Lawrence R. Brodkey, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

NEWTON, J.

This is an action for a deficiency judgment following the foreclosure of a real estate mortgage. The primary question presented is whether a provision in a contract of sale that a vendee shall assume and pay a mortgage is merged in a deed which states it is subject to the mortgage but silent on the question of assumption. The district court entered judgment for a deficiency and that judgment is affirmed.

Plaintiffs listed certain real estate owned by them subject to a mortgage for sale. Defendant was interested in purchasing the property but desired to make only a small cash payment. A new mortgage for a larger sum was then entered into by plaintiffs to cut down the amount required as a cash payment. Sale was made to defendant for $1,000, subject to a mortgage of $10,000 which defendant assumed and agreed to pay. The deed omitted the assumption of mortgage clause and stated conveyance was subject to the mortgage. The mortgage was subsequently foreclosed and a deficiency judgment requested against plaintiffs. This they settled. Plaintiffs sought reimbursement for the deficiency from defendant and obtained judgment therefor.

Defendant asserts the contract of sale is not enforceable because plaintiffs were joint owners and only one of them signed the contract. The contract provided

that vendor would "convey or cause to be conveyed" the property sold. The property was in fact conveyed with both owners joining in the conveyance. "The rule that mutuality is an essential element of an executory contract is not applicable to executed contracts or where the party not bound has performed its conditions." 17 Am. Jur. 2d, Contracts, § 12, p. 351. See, also, Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026; Stearns v. Nebraska Building & Investment Co., 109 Neb. 657, 192 N. W. 330.

It is the general rule that for most purposes when a deed is made in execution of a contract of sale, the provisions of the contract are merged in the deed. See Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659.

There are exceptions to the foregoing general rule. One exception relates to the assumption of a mortgage as part of the consideration. " 'The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.' " Barth v. Reber, 135 Neb. 25, 280 N. W. 219. The rule is well settled that: "An agreement to pay an existing mortgage, as part of the consideration for a conveyance of mortgaged premises, need not be inserted in the deed, neither must it necessarily be in writing. Such an agreement is an independent undertaking of the party making it, the conveyance affording sufficient consideration to sustain it when its existence is established by a preponderance of evidence." Reynolds v. Dietz, 39 Neb. 180, 58 N. W. 89. See, also, Rockwell v. Blair Savings Bank, 31 Neb. 128, 47 N. W. 641; Wiltrout v. Showers, 82 Neb. 777, 118 N. W. 1080; Logan Valley Bank v. Christensen, 98 Neb. 49, 151 N. W. 939.

There can be little, if any, question about the nature of the agreement entered into by the parties. The purchase agreement specifically states that the buyer was to assume a loan of $10,000 and the settlement agreement reflects a "mortgage assumption fee." The

defendant buyer admits he helped the real estate agent make up the contract of sale. He further admits it was his understanding that he was to pay the mortgage. The agreement by defendant to assume the mortgage is supported by the evidence and we are compelled to conclude that a jury question was presented. "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence." Parsons Constr. Co. v. State, 180 Neb. 839, 146 N. W. 2d 211.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY KOCH, APPELLANT.
196 N. W. 2d 910

Filed April 27, 1972. No. 38315.

Criminal Law: Sentences: Appeal and Error. This court will not interfere with a sentence imposed by the district court unless the sentence appears to be an abuse of discretion.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin and Orval W. Von Seggern, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SMITH, J.

Gary Koch pleaded guilty to an information that charged him with unlawfully possessing peyote and with feloniously dispensing the substance. The district court imposed concurrent sentences of imprisonment for 1 year on the first count and for 3 to 5 years on

the second count. Koch appeals. He asserts that the sentences are excessive.

Koch, age 24, passed the tenth grade in school and "GED in service" or "GED at G. I. H. S." He enjoys attending school. There is evidence of no prior felony convictions and of an honorable discharge from the Navy. The probation officer reported that Koch had been a leader of many teenagers and that he had induced them to use drugs. The court remarked that Koch had testified in another case and that the testimony indicated involvement of Koch in the drug business.

This court will not interfere with a sentence imposed by the district court unless the sentence appears to be an abuse of discretion. State v. Claire, *ante*, p. 373, 196 N. W. 2d 519.

Koch violated the Uniform Controlled Substances Act. For these offenses it prescribes imprisonment for not less than 1 year nor more than 5 years, or a fine of not more than $2,000, or imprisonment in the county jail for not more than 6 months, or both such fine and imprisonment. See §§ 28-4,117, Schedule I (c) (9), 28-4,125 (2) (b), R. S. Supp., 1971. The sentences imposed upon Koch fell within the discretion of the district court. The judgment is affirmed.

AFFIRMED.

IOLA M. MARTIN, APPELLEE, V. GRANT L. MARTIN, APPELLANT.
197 N. W. 2d 388

Filed May 5, 1972. No. 38203.

1. **Divorce: Property: Alimony: Contracts: Equity.** It is the duty of the court to scrutinize settlement agreements closely in divorce actions and to protect against fraud, intimidation, and ignorance and guard against unconscionable results. The court is required to render a fair and equitable result under all the circumstances.

2. **Attorneys at Law: Trial.** A party who appears pro se is subject to and will receive the same consideration as if he had been represented by an attorney.
3. **Attorneys at Law: Trial: Stipulations: Parties.** Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.
4. **Courts: Trial: Stipulations: Parties.** Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo.
5. **Trial: Stipulations: Parties.** Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances.
6. **Actions: Equity: Appeal and Error: Evidence: Witnesses.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
7. **Divorce: Alimony: Judgments: Appeal and Error.** The judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

Beynon, Hecht & Fahrnbruch, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

WARREN, District Judge.

This is a divorce action wherein plaintiff Iola M. Martin was granted an absolute divorce on May 3, 1971, from the defendant Grant L. Martin on grounds of extreme cruelty. Defendant concedes that plaintiff is entitled to a divorce and that plaintiff should be awarded one-half of the property of the parties, but attacks the trial

court's division of property and alimony provisions on various grounds.

Plaintiff was 60 years of age at the time of trial, and defendant was 63. They were married in 1935 and their three children were grown and emancipated. They have been in various businesses in and near Lincoln since their marriage, and for the past 5 years have owned and operated a valuable dairy and stock farm a short distance west of Lincoln, consisting of approximately 400 acres. The evidence demonstrated without question that the defendant was a man of violent and surly disposition, an absolute dictator to his wife and children, and a man who was guilty of extreme cruelty, both physical and mental, in every sense of that legal terminology. The plaintiff had admittedly made substantial and continuing contributions to the accumulation of property, both as a farm wife and otherwise. The trial court awarded each party an undivided one-half interest in the farm real estate, subject to defendant's sole use and entitlement to the income therefrom from December 1, 1969, to March 1, 1972, conditioned upon payment of $900 to plaintiff, the payment of real estate taxes for 1970 and 1971, the maintenance of improvements in good condition, and payment of all expenses of operation, maintenance, and improvement of the farm real estate after December 1, 1969. Plaintiff was awarded as her separate property an automobile valued at $1,190 and $3,600 in bank money orders. Defendant was awarded farm machinery, livestock, and miscellaneous farm personal property valued by the court at $63,755. The parties had each purchased a $15,000 certificate of deposit in 1968 from the proceeds of a land sale, and each had expended a portion thereof in payment for permanent improvements to the 400-acre farm. After such expenditures, plaintiff was awarded the $10,253.88 balance of her certificate of deposit, and defendant was awarded the truck and farm machinery he purchased with the $7,457.30 balance of his certif-

icate of deposit funds. Each was allotted a portion of the household goods. Defendant was ordered to pay plaintiff as alimony the sum of $20,000 in three installments, without interest, ending September 1, 1972, together with further alimony of $3,900 payable to plaintiff at $65 per month for 60 months commencing March 1, 1972, with credit to be allowed thereon for any Social Security payments received by plaintiff during that period. Defendant was required to pay all indebtedness incurred before December 1, 1969. Costs were taxed to defendant including an attorney's fee of $4,300 for plaintiff's attorney. The court specifically considered the fact that no temporary support had been paid plaintiff during the 13½ months of litigation.

Until the time of filing his motion for new trial, the defendant acted as his own counsel, despite the repeated suggestions of the trial judge and plaintiff's attorney that he employ counsel. Defendant's stubborn insistance that he act pro se resulted in a trial of 5½ full days duration, a complex record of monumental proportions, a series of debates by defendant with witnesses, and a disruption of the entire trial process. The record demonstrates that the trial judge, exhibiting patience far beyond the call of duty, acted throughout the trial with complete fairness to the defendant, a fact which the defendant acknowledged many times during the trial.

Defendant's first contention is that the court erred in not upholding a written agreement, termed the "Wilson Agreement," entered into by the parties on December 1, 1969. Plaintiff testified that defendant had the property settlement agreement prepared on his own, that she was afraid that if she didn't sign it she would forfeit everything, and that she was fearful of physical harm if she did not sign it. The so-called Wilson Agreement provided, among other things, that defendant should have the use of the 400-acre farm, and home thereon, and all farm machinery, for 5 years, upon payment to

plaintiff of $600 a year rent. The trial court held that plaintiff's execution of the Wilson Agreement was coerced by the defendant, was not entered into freely and voluntarily by plaintiff, was unfair and inequitable in its provisions, and was therefore null and void.

This court has stated: "It is the duty of the court to scrutinize settlement agreements closely in divorce actions and to protect against fraud, intimidation, and ignorance and guard against unconscionable results. The court is required to render a fair and equitable result under all the circumstances." Diers v. Diers, 185 Neb. 552, 177 N. W. 2d 503. We have concluded that the trial court properly held the Wilson Agreement to be a nullity.

During the second day of trial, the defendant, acting pro se, orally stipulated with plaintiff in open court that the court should determine the property of the parties and its value as it existed on December 1, 1969. The stipulation was the result of defendant's repeated refusal to testify regarding the cattle or other personal property he owned at the time of trial, or about his dealings after December 1, 1969. In that connection, defendant testified as follows: "What I bought afterwards is none of your business; and what I traded is none of your business; none of her business."

The court, after carefully informing the defendant as to the effect of such a stipulation, accepted the same, and the evidence thereafter was directed to the date of December 1, 1969, to the exclusion of testimony as to the property situation at the time of trial. The defendant now contends that the court erred in determining and valuing the property as of December 1, 1969, rather than at the time of trial as is the general rule.

The defendant was acting as his own counsel, as he had every right to do; but when a party does so, his rights are subject to and will receive the same consideration as if he had been represented by an attorney. Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497. Stip-

ulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.

Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances. Ehlers v. Vinal, 382 F. 2d 58; Farmers Co-op. Elevator Assn. Non-Stock, Big Springs, Nebraska v. Strand, 382 F. 2d 224. Defendant did not ask to be relieved of the stipulation during trial, and he is not now in a position to secure such relief, particularly where the stipulation was acted upon by the parties in the trial court in restricting proof offered to property and values only as of December 1, 1969. Defendant's second contention has no merit.

Defendant's remaining contentions are directed to the trial court's division of property and award of alimony. The evidence as to the extent of personal property owned on December 1, 1969, and the valuation thereof is sharply conflicting. "Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Keenan v. Keenan, 187 Neb. 686, 193 N. W. 2d 568.

Under the circumstances shown by this record, plaintiff was entitled to one-half of the accumulated prop-

erty of the parties. The defendant never contended otherwise. A careful review of the trial court's extensive and detailed findings of fact convinces us that the division of property and provisions for payment of alimony are fair and reasonable, and that the award of the trial court should be approved.

The defendant complains that he should have been awarded the entire title to the real estate, with an award of money alimony to plaintiff for her one-half interest in the farm. This court has where possible favored a division of property in such manner as to permit a husband to retain the means to pay off any judgment awarded to the wife. Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430. However, there are special circumstances disclosed by the record in this case. Testimony as to valuation of the farm varied from $70,000 to $98,600. The defendant had decided that he could not continue to operate the farm alone due to his advancing age and declining health. He had been actively attempting to sell the farm since December of 1969; he was advertising it for rent. Furthermore, the court provided for defendant's exclusive use of the farm until March 1, 1972, and he was awarded all of the farm machinery, equipment, and livestock. In Newton v. Newton, 188 Neb. 242, 196 N. W. 2d 116, this court said: "A judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown." We cannot say that the defendant has shown good cause why the provision for the award to each party of an undivided one-half interest in the real estate should be modified.

With reference to the allowance of attorney's fees, the court must consider the fact that defendant's obstinate refusal to employ counsel during the trial of this action in district court, and the resultant bill of exceptions containing 1,054 pages of testimony and 153 exhibits, of necessity caused an unusual and extensive expenditure of time and effort by plaintiff's counsel in

this appeal. Plaintiff is allowed $2,000 for the services of her attorney in this court.

We affirm the judgment of the trial court.

AFFIRMED.

IN RE APPLICATIONS OF PETROLEUM TRANSPORT SERVICE, INC., COUNCIL BLUFFS, IOWA, ET AL.
PETROLEUM TRANSPORT SERVICE, INC., ET AL., APPELLANTS, V. WHEELER TRANSPORT SERVICE, INC., ET AL., APPELLEES.
197 N. W. 2d 8

Filed May 5, 1972. No. 38282.

1. **Public Service Commissions: Carriers: Trial.** In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsible to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.
2. **Public Service Commissions: Carriers: Statutes.** The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall.

Appeal from the Nebraska State Railway Commission. Reversed.

Viren, Epstein & Leahy, for appellants.

James E. Ryan, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SPENCER, J.

Petroleum Transport Service, Inc., Bray Lines, Inc.,

and Groendyke Transport, Inc., appeal from the denial of their separate applications to transport anhydrous ammonia and fertilizer solutions from the Phillips Petroleum plant at Hoag, Nebraska, over irregular routes to all points and places in Nebraska. The applications were heard on a consolidated record, and were protested by the following appellee carriers: Wheeler Transport Service, Inc.; Herman Brothers, Inc.; Bulk Carriers, Inc.; Wynne Transport, Inc.; O. E. Poulson, Inc.; Henry W. and T. Clarence Bridge, doing business as Bridge Bros.; Ruan Transport Corporation; Ward Transport, Inc.; and Peake, Inc. We reverse.

The first hearing in this matter was held February 25, 1970, and on June 1, 1970, the applications were granted as applied for. Appellees filed motions for rehearing and reconsideration. On October 26, 1970, the Commission granted the motion for rehearing and rescinded the order entered June 1, 1970, and held a further hearing which resulted in the present order denying the applications, which was entered on June 7, 1971.

Appellants urge that the granting of the motion for rehearing and the rescinding of the order entered on June 1, 1970, and the granting of the order on June 7, 1971, denying the applications, are contrary to the law and the evidence and are null and void as being arbitrary and unreasonable.

The appellants, who are headquartered in states other than Nebraska, are motor carriers of anhydrous ammonia and fertilizer solutions, with extensive operations in interstate commerce. Appellants have been hauling these commodities from Hoag, Nebraska, in interstate commerce. The demand for anhydrous ammonia and its shipping date depends upon the amount of rainfall in the areas where the commodity is to be used. If there is a certain moisture content on the land, it cannot be used. On occasions appellants have had equipment standing at Hoag, Nebraska, for the purpose of rendering service in interstate commerce, and because of cli-

matic conditions in states served from Hoag, Nebraska, its trucks are idle when at the same time Phillips Petroleum Company is without available equipment from carriers holding authority in Nebraska to conduct transportation in Nebraska intrastate commerce because of the heavy demand for fertilizer.

The testimony of the shipper's regional director of rates and services indicated that Phillips, which has extended its fertilizer operations in surrounding areas, is faced with extremely high distribution costs brought about by rate increases and keener competition. Phillips has shifted its rail tonnage to trucks because railroads were found to be unsatisfactory for the movement of fertilizer. Ninety percent of the fertilizer volume moves during the months of April, May, and June. Fertilizer distribution is completely seasonal, with a peak month within the season and a peak week within that month. Phillips must not only compete for business but also for the equipment of fully certified motor carriers. It must also compete with the climatic condition, which is the determining factor in the demand and use of fertilizer.

Phillips has actively solicited the appellants herein to obtain additional equipment, and in spite of their cooperation Phillips has been unable to meet the needs and demands of its customers. To be competitive, Phillips purchased 18 trailers and leased them to one of the appellees. In spite of this heavy investment, it is still unable to meet its needs. Phillips is not interested in any additional investment in trailers, and is willing to sell its present trailers if the carriers can furnish it with sufficient equipment. It urges the granting of the applications herein to help alleviate the situation.

The Commission found that there is no doubt there is a problem in the transportation of anhydrous ammonia during the peak season, although both appellants and appellees testified that they had some equipment available which was not used in the peak season. This was due, with regard to appellees' equipment, to the lack of

knowledge of the availability of this equipment by the shippers. On the part of the appellants, this was due to bad weather in the areas into which they were certified to transport anhydrous ammonia. The Commission found that it is clear from the evidence that the present Nebraska interstate carriers of anhydrous ammonia and liquid fertilizer solutions cannot fulfill the need for transportation of these commodities during the peak season to the satisfaction of all shippers. The Commission also found that the amount of equipment that appellants could supply would not make an appreciable contribution to the solution of the problem and this is the basis on which the applications were denied.

The Commission specifically found that the appellants are willing and able to properly perform the services proposed and to conform to the provisions of sections 75-301 to 75-322.01, R. R. S. 1943, and the requirements, rules, and regulations of the Commission thereunder. It further found that the proposed intrastate service is not required by the present or future public convenience and necessity. It is this latter finding we question.

The appellees concede that there are times in the peak season when the needs of Phillips and others who are their competitors are such that appellees do not have sufficient equipment to meet the demands of the shippers, but they allocate their equipment in as equitable a manner as possible between all of the shippers. Appellees are protesting the applications because of the competition the appellants would provide during the off season when the equipment available by the appellees is more than adequate to meet the demands of the shippers. Phillips' testimony is that it expected to use appellants' equipment to move its commodities only during the peak season.

The law applicable herein was enunciated in Poulson v. Hargleroad Van & Storage Co., 183 Neb. 201, 159 N. W. 2d 302, in which we held: "In determining the issue of public convenience and necessity, in cases where new

or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well as by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.

"The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall."

The record is conclusive that the appellees cannot adequately meet the shippers' demand or need at peak periods. If 90 percent of the fertilizer volume comes during the peak periods, it should be evident that the volume the rest of the year should not control the granting of the applications herein. We appreciate that there will be peak periods within the peak periods, when even the granting of these applications will not completely meet the need, but it is evident that it will come more nearly doing so than the denial of the applications.

We find the conclusion reached by the Commission that the amount of equipment the appellants could supply would not make an appreciable contribution to the solution of Phillips' problem is not justified by the record. We believe it is based on the erroneous asumption that because appellants did not supply equipment during the past season they would be unable to do so in the future. The failure to supply equipment pending the contest of the order sustaining the motion for rehearing, and the denial of the applications, was on the advice of counsel and is not to be considered as a cri-

terion of what would be done if the applications were granted.

We find the Commission was correct in the first instance in granting the applications, and hold that the sustaining of the motion for rehearing and the denial of the applications was arbitrary and unreasonable. The order is accordingly reversed.

REVERSED.

LLOYD HOOVER, AND IN BEHALF OF ALL OTHER PERSONS SIMIILARLY SITUATED, APPELLANT, V. JOHN CARPENTER ET AL., APPELLEES.

197 N. W. 2d 11

Filed May 5, 1972. No. 38305.

Municipal Corporations: Ordinances: Referendum. Whether a municipal ordinance is subject to referendum is determined by the language of the applicable provision for referendum and by the facts of each case.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

E. Merle McDermott, for appellant.

Duane A. Burns and Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees.

Stewart, Calkins, Duxbury & Crawford, for amicus curiae.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SMITH, J.

The broad question is whether a municipal ordinance that established rates for electric energy supplied by a plant owned by the city is subject to referendum. Although the district court dismissed a petition to uphold the right of referendum by a declaratory judg-

ment, it found the referendum inapplicable. Plaintiff appeals.

The City of Grand Island, a city of the first class, operates under the city manager form of government. It has adopted the referendum laws pertaining to cities of the first class.

The city pursuant to a vote of the electors in 1905 acquired a light plant for supplying customers at retail. Revenue bonds have been issued from time to time, and some are outstanding. The council in November 1970, enacted an ordinance that generally increased electric rates charged to retail customers. The service area extended outside the territorial limits of the city.

No ordinance, resolution, or contract may abridge the powers of cities of the first class to establish rates for supply of electric energy. § 16-679, R. R. S. 1943. Other sections provide that electors of such cities may reserve the right of referendum on any ordinance or other measure subject to exceptions immaterial here. See, §§ 18-119, 18-129, 19-638, and 19-640, R. R. S. 1943. The council must levy a sufficient tax to operate the plant and to provide for payment of bonds. See § 19-1403, R. S. Supp. 1971.

In 1963 the Legislature established the Power Review Board chiefly to eliminate competition among public suppliers of electric energy at wholesale and retail. Section 70-1017, R. R. S. 1943, a part of the original act, reads: "Any supplier of electricity at retail shall furnish service, upon application, to any applicant within the service area of such supplier. If the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished, or if the applicant alleges that the supplier is not treating all customers and applicants fairly and without discrimination, the matter shall be submitted to the board for hearing and determination." From any final action of the board an appeal may be taken to this court. § 70-1016, R. R. S. 1943.

Differences exist among the States on the applicability of the referendum to rates of municipal utilities. See 5 McQuillin, Municipal Corporations (3d Ed. Rev., 1969), § 16.57, n. 65, p. 220, and 16.58, n. 98, p. 225; 12 id., § 35.37, p. 479 (1970). Language reserving the right no doubt accounts for some of the differences.

For purposes of judicial review of the reasonableness of rates, the establishment of rates is ordinarily a legislative function. See Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney, 186 Neb. 168, 181 N. W. 2d 682 (1970).

The Legislature in providing for the right of referendum has used the word "legislative" or a similar word in one section alone. See § 18-119, R. R. S. 1943. This court has said that legislative matters, but not administrative matters, are subject to the right. See Kelley v. John, 162 Neb. 319, 75 N. W. 2d 713 (1956) (rezoning ordinance with right of appeal was an administrative matter not subject to referendum). The contradistinction has been criticized on the ground that its application is difficult, and abandonment of it has been recommended. See Antieau (4th Ed., 1964), Cases and Problems on the Law of Municipal Corporations, pp. 299, 300. The criticism is not without merit. Compare Kelley v. John, *supra,* with Scottsbluff Improvement Assn. v. City of Scottsbluff, 183 Neb. 722, 164 N. W. 2d 215 (1969) (rezoning ordinance was a legislative matter not subject to judicial review by a proceeding in error); cf. School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301 (1967).

Without an apocalyptic view, we adopt this rule: Whether a municipal ordinance is subject to the right of referendum is determined by the language of the governing legislative provision for referendums and by the facts of each case. Kelley v. John, *supra,* is modified accordingly.

In the present case we consider (1) the number of electors affected; (2) the existence of revenue bonds;

(3) the temporal nature of the rate ordinance; (4) the statutory authority of the Power Review Board; (5) the need for expertise to determine the reasonableness of rates; and (6) the fairness of our denying or upholding the right of referendum. Only the first consideration points toward the right of referendum. The others point the opposite way.

The district court in finding referendum inapplicable was correct.

AFFIRMED.

THOMAS V. HOFFMANN, APPELLANT, V. RUTH A. HOFFMANN, APPELLEE.
197 N. W. 2d 373

Filed May 12, 1972. No. 38098.

1. **Divorce: Alimony.** The fixing of the amount of alimony rests, in each case, within the sound discretion of the court.
2. ———: ———. The problems of alimony awards are not subject to solution by mathematical formula. Generally speaking, awards of this court in cases of this kind vary from one-half to one-third of the value of the property, depending on the facts and circumstances of the particular case.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Affirmed.

Quigley, Dill & Quigley, for appellant.

Reddish, Fiebig & Curtiss, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Ruth A. Hoffmann, the defendant, was granted an uncontested divorce from the plaintiff, Thomas V. Hoffmann, as well as the custody of their three minor children. No appeal is being taken on this portion of the decree. In a separate hearing the district court deter-

mined the issues of alimony, child support, and division of property. The appeal herein involves only one question: The size of the alimony award. We affirm.

The factors to be considered by this court in the determination of the excessiveness or sufficiency of an alimony award are well established. See Strasser v. Strasser (1950), 153 Neb. 288, 44 N. W. 2d 508.

The trial court ordered plaintiff to pay $210 per month child support and alimony in the amount of $70,750 in 10 equal annual installments of $7,075 each. The alimony installments were to be secured by plaintiff's written bond for $70,750, secured by a pledge of 115 shares of stock in the Hoffmann Cattle Company. The court further awarded the defendant the family car and various other items of personal property; ordered the plaintiff to pay certain of defendant's debts, in the amount of $2,707.35; the defendant's legal fees; and all costs of the action.

The parties were married in September 1958, and are both in their early thirties. There is evidence in the record that the defendant does have some health problems, and during the marriage incurred substantial medical bills. In 1969, she underwent ovary surgery and is now required to take hormone shots, and will do so for the remainder of her life. Her drug bills are and will continue to be substantial. The plaintiff has a degree in animal husbandry from the University of Nebraska. The defendant completed 1 year of college. At the beginning of their marriage they lived together on various military bases until the plaintiff was discharged from the Army in November 1960. They then moved to a ranch owned by plaintiff's parents in Cherry County, Nebraska.

When the parties separated in 1967, the defendant moved to Alliance, Nebraska; set up a separate home for herself and her children; and attempted to support herself on a monthly temporary alimony award of $225. They lived in a house owned by her father and some

other relatives. A rental arrangement was made, but the defendant testified that she was unable to pay any rent. Since 1967, the record indicates that defendant has attempted to supplement her income by taking odd jobs, such as ironing, caring for an elderly woman, giving music lessons, and acting as a census numerator. The usual difficulties of attempting to fit responsible employment into the necessities and requirements of motherhood appear in this record. Her income from these jobs was of such limited amounts as to be of little significance in the determination of the issues in this case.

The record shows that defendant quit college in order to marry, and, after occupying herself as a housewife and mother for the intervening years, is now in the unenviable position of having to support herself and her three growing children while being qualified only for menial or low-paying jobs. She has enrolled in Chadron State College in order to improve her earning ability. She has joined in a car pool with other local women for the purpose of commuting. Under present conditions, she can complete her education and acquire a teaching certificate in 5 years. She appears to be an energetic and capable woman and, health permitting, has worked out a practical solution to her financial problem in attempting to train herself for suitable employment. If she can secure the necessary means to accomplish this purpose, she will be restored to the roll of a self-supporting and productive member of society, besides being able to adequately care for and raise her children. It appears without dispute that in the absence of an adequate alimony award, she will be unable to execute this laudable plan because it will be impossible for her to secure the funds for its achievement.

The plaintiff is employed by the Hoffmann Cattle Company and draws an annual salary of $4,800 per year. The corporation also furnishes him a trailer home on the ranch; pays for health insurance for himself and

family; furnishes him meat; and pays $25 monthly to an investment company for him. His income from the corporation in the 4 years preceding 1970, averaged $6,463. His assets, other than his stock in the Hoffmann Cattle Company, total $4,420.27. The Hoffmann Cattle Company is a subchapter "S" corporation, owned entirely by the Hoffmann family. It was originally organized by the plaintiff's father. It is a 13,280-acre ranch in Cherry County, Nebraska. The assets of the corporation, including real estate, livestock, machinery, and cash, are presently worth $870,010.23. The court arrived at the book value of plaintiff's corporate stock by taking current values on the day of the trial, which values were stipulated by the parties. At the present time, of 1,400 shares of outstanding stock, the plaintiff owns 450 shares. His brother owns an identical number, and his father retains 500 shares. The difficult aspect of this case, and the one stressed at length by plaintiff, is the problem created by the corporate ownership of the ranch property and the fact plaintiff is a minority stockholder. Plaintiff's stock interest as of the date of the trial had a book value of $279,643.50.

The fixing of the amount of alimony rests, in each case, within the sound discretion of the court. Neeman v. Neeman (1968), 183 Neb. 105, 158 N. W. 2d 236. This court has observed many times that the problems of alimony awards are not subject to solution by mathematical formula. Generally speaking, awards of this court in cases of this kind vary from one-half to one-third of the value of the property, depending on the facts and circumstances of the particular case. Loukota v. Loukota (1964), 177 Neb. 355, 128 N. W. 2d 809.

The plaintiff is the present owner of property with a value in excess of $280,000, which must be considered. Present income from a family corporation cannot be the sole criterion where a party is the owner of a substantial interest, even though a minority one, in that corporation. The trial court was faced with

the problem of making a division of that interest. We cannot say it abused its discretion in doing so. Rather than making a distribution of the shares of stock in the corporation, it gave defendant an amount the present value of which is considerably less than one-fifth, payable over a period of 10 years. Under the circumstances presented by this record, we cannot conclude the trial court dealt unfairly or unreasonably with the plaintiff in this respect, and its decision is approved.

The defendant is awarded $500 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE ELLIS NEWTE, APPELLANT.
197 N. W. 2d 403

Filed May 12, 1972. No. 38140.

1. **Criminal Law: Witnesses: Trial.** The trial judge is vested with a broad discretion to properly circumscribe inquiry into a criminal defendant's past conduct when that subject is raised during the cross-examination of a defense character witness.
2. **Criminal Law: Witnesses: Trial: Evidence.** While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, this doctrine does not extend to cross-examination.
3. **Criminal Law: Witnesses: Trial.** Upon cross-examination of a witness who has testified to general reputation, questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention.
4. ———: ———: ———. The extent of the cross-examination of a witness must be left to the discretion of the trial court.
5. ———: ———: ———. A character witness may be cross-examined as to an arrest whether or not it culminated in a conviction of the defendant.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Frank B. Morrison, Sr., and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The appellant was charged and convicted of robbery. At trial, several different versions of the fact situation were disclosed to the jury. The victim of the robbery was a cab driver who testified as follows: At an early morning hour on November 27, 1970, two men entered the driver's cab while it sat in front of a bus depot in Omaha. The cab driver had been noticing a white car with a dented fender as it circled the block before the two men entered the cab. The driver proceeded to a destination requested by his passengers. Upon arrival, one of the passengers, identified by the driver as the defendant, put a dull object to the back of his neck while the other passenger jumped over the front seat and took the driver's money, glasses, and wristwatch. Both men then fled on foot and the driver made an attempt to follow. While attempting to follow the men and then moments later when the police were on the scene, the white car with a dented fender was again noticed by the cab driver.

Police officers testified that they stopped the white car pointed out to them by the cab driver and they searched the occupants. One of the occupants, Ronald Chatman, was carrying a number of small bills and a wristwatch that matched the cab driver's description. The defendant, George Newte, was not in the car. After the occupants were arrested, one of them informed police that the defendant Newte had also been involved in the robbery. Later police arrested Newte and took a statement from him. The statement, read to the jury,

was essentially Newte's denial that he had ever entered the cab or participated in the robbery. Ronald Chatman testified for the defense and contradicted elements of Newte's written statement. Chatman said that Newte did enter the cab with him but did not want to rob the driver. According to Chatman, Newte got out of the cab before the driver was robbed. Newte took the stand at trial, said his written statement did not contain the true facts, and testified to facts which were nearly identical to those given in Chatman's testimony. The State then called a rebuttal witness who had interviewed Chatman previously and another version of the robbery was presented. Chatman had told this witness that his recollection of the facts of the robbery was poor due to intoxication, but he did remember taking the watch from the cab driver's wrist and Newte giving him some of the cab driver's money.

Although the briefs contain much able and refined discussion of the theory and problems involved in the examination of a character witness in a criminal case, the essential question in this case boils down to whether a character witness produced by the defendant in a criminal prosecution may be cross-examined as to an arrest of the defendant whether or not it culminated in a prior conviction. It is clear from the statement of facts heretofore given that there were several versions of the alleged robbery before the jury and, consequently, that the veracity of the witnesses was in question. The defense itself called a state parole officer under whose supervision the defendant had been while on parole from a previous offense. This witness testified that he knew the defendant's reputation for truth and veracity, and after further foundation testified that he would believe the defendant under oath. As a part of his foundation testimony, the parole officer stated that his opinion of the defendant's testimony was based in part upon contact with men who had known the defendant while at the reformatory.

On cross-examination by the prosecutor, the court sustained several objections to questions, the target of which were prior arrests or charges made against the defendant. It appears that the court not only sustained the objections but directed the jury and advised it to disregard the questions themselves, even though there was no answer in the record. The pertinent part of the testimony admitted by the court and under attack in this case is as follows: "Q. (Mr. Brown) Do you know—

"Mr. Schirber: Your Honor, I also object, it should be if he has any convictions only.

"Mr. Brown: I think arrests would have to do with his reputation also, your Honor.

"The Court: He can answer. Do you understand the question?

"The Witness: I'm—I don't.

"The Court: Let me suggest, Mr. Brown, that you rephrase the question. I think it was changed perhaps in the middle and I doubt whether it would be helpful to have it read back.

"Q. (Mr. Brown) Do you know whether or not Mr. Newte, the Defendant here, has had any arrests or convictions since his parole from the Nebraska Penal and Correctional Complex?

"Mr. Schirber: Same objection.

"The Court: Overruled. He may answer.

"The Witness: Sir, I don't. Mr. Newte has been discharged. I don't have his file.

"Q. (Mr. Brown) Well, I am asking you about whether you know or not.

"A. No, sir, I do not."

At the outset, we observe that a line of inquiry directed towards the defendant's previous character is firmly forbidden the State on direct examination. On the other hand, a defendant may adduce affirmative testimony that the general estimate of his character is so favorable the jury may infer he would not be

likely to commit the offense charged. However, "When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay." Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168. As the decisions have noted, the courts, in ruling on the admissibility of hearsay testimony in this area are called upon to rule in an illogical and anomalous situation. The question arises as to the latitude of the prosecutor's inquiry into the hearsay basis and foundation. The rule properly to be deduced from the decisions all over the United States in this area is that the trial judge is vested with a broad discretion to properly circumscribe inquiry into a criminal defendant's past conduct when that subject is raised during the cross-examination of a defense character witness. Basye v. State, 45 Neb. 261, 63 N. W. 811; Michelson v. United States, *supra;* 3A Wigmore on Evidence (Chadbourn Rev., 1970), § 988, p. 912. The rule is well settled in this state. As early as Basye v. State, *supra,* this court said as follows: "While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, yet this doctrine does not extend to cross-examination. It is firmly settled by the adjudications in this country that upon cross-examination of a witness who has testified to general reputation questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention, and asked whether he ever heard them. This is permissible not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony. *The extent of the cross-examination of a witness must be left to the discretion of the trial court.* The questions

put to the several witnesses were within the scope of a legitimate cross-examination, and there was *no abuse of discretion in permitting them to be answered.*" (Emphasis supplied.)

The precise question, of course, presented by the defendant's brief is whether a cross-examination as to a previous arrest or some other offense is permissible within the latitude of legitimate cross-examination. Following the overwhelming weight of authority (see Annotation, 47 A. L. R. 2d 1258) the Supreme Court of the United States has consistently followed and adhered to the rule announced in Michelson v. United States, *supra,* by stating categorically that "a character witness may be cross-examined as to an arrest whether or not it culminated in a conviction, according to the overwhelming weight of authority." See, also, Mannix v. United States, 140 F. 2d 250; Josey v. United States, 135 F. 2d 809; Spalitto v. United States, 39 F. 2d 782. It is true that the Michelson opinion, around which so much of the argument centers in the briefs in this case, contains a considerable discussion by way of dicta of the theory, difficulties, problems, and suggested procedures for judges to follow in solving the problem. However, it appears abundantly clear in the Michelson case, in a situation directly in point with the case at bar, that such evidence is permissible, rests within a wide and broad discretion of the trial court under all circumstances, and will not be reversed or set aside unless there is a clear abuse of the discretion. After a discussion and a suggested approval of some of the procedures that have been followed by some of the courts, that court concluded with this clear holding which is decisive of the case at bar: "The present suggestion is that we adopt for all federal courts a new rule as to cross-examination about prior arrest, adhered to by the courts of only one state and rejected elsewhere. The confusion and error it would engender would seem too heavy a price to pay *for an almost im-*

perceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic.

"The judgment is affirmed." (Emphasis supplied.)

We further feel that when we are dealing with the limitation of cross-examination in such a broad and vague field, it would be unwise for this court to formulate any rigid rule for the exclusion of evidence of previous arrests. As Mr. Justice Frankfurter stated in the concurring opinion in Michelson v. United States, *supra,* it would be unwise to deny trial courts a power to control, under all of the circumstances, the allowable scope of cross-examination in such an admittedly broad area, precipitated by the granting to a defendant in a criminal case of a right which is impermissible under all other evidentiary standards for which there is no logical rationale.

In a more precise examination of the question of alleged abuse of discretion by the trial court, we observe that the trial court did sustain every objection directed at a question mentioning a prior arrest for auto theft. Although as we have pointed out, this was not necessary under the principles announced in Michelson and Basye, nevertheless the defendant had the benefit of these rulings and an admonition by the trial court to disregard such questions. Second, we observe that the question complained of by the defendant was answered in the negative and there was no affirmative evidence in the record of the arrest to which the question was directed. Third, and more important, the jury already knew from the voluntary, direct examination of the defendant himself that he had been previously arrested and convicted of a crime. Surely, alluding to another subsequent arrest on cross-examination would not bring into play any prejudice which should limit legitimate cross-examination of a character witness. In examining the record in this case we are unable to find that the prosecutor's questions fell within

the inhibition of "asking a groundless question in order to waft an unwarranted innuendo into the jury box." We further observe that the defendant at no time objected to the form of the question asked by the prosecutor on cross-examination, but rather based his objection upon the contention that the question would have to be targeted at prior convictions rather than prior arrests. The contention that a calculated innuendo of prior guilt against a previously innocent defendant was wafted into the jury box is without merit in this case.

The above conclusions are reinforced in the record by the fact that the defendant himself admitted he violated the terms of his parole which forbad association with criminal confederates, and which he violated by being in their company at the time of the commission of the robbery involved.

In this case, two men, the witness Chatman and the defendant, got into a taxicab in the middle of the night in Omaha. The cab driver positively identified the defendant as one of the men; the defendant admitted being in the cab at the time; and Chatman too admitted being in the cab at the time. Although these last two witnesses attempted to change their testimony the evidence is convincing that Chatman, prior to the time of the trial, stated he was in the cab and he remembered taking the watch from the cab driver's wrist and that the defendant gave him some of the cab driver's money.

Considering the evidence and the testimony in the case and the elusive nature of the argued contention of prejudice from the admission of the testimony of the previous arrest, we think the following rule is applicable: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if this

court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." State v. Sharp, 184 Neb. 411, 168 N. W. 2d 267.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

CHARLES A. DICKEY ET AL., APPELLANTS, V. ESTATE OF KATHERINE MEIER, DECEASED, ET AL., APPELLEES.
187 N. W. 2d 385

Filed May 12, 1972. No. 38185.

Actions: Negligence: Master and Servant: Agents: Release. In a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or principal from liability, even though the release specifically reserves all claims against the employer-principal.

Appeal from the district court for Pierce County: MERRITT C. WARREN, Judge. Affirmed.

Hutton, Hutton & Garden, Margolin, Goldblatt & Steinstra, and McGroarty & Welch, for appellants.

Deutsch & Hagen, Thomas H. DeLay, and Rogers & Rogers, for appellees.

Heard before WHITE, C. J., SPENCER, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The plaintiff, Charles A. Dickey, was injured in an accident on December 2, 1964, when Matthew Meier, an agent and employee of Katherine Meier, backed a pickup truck into another vehicle pinning the plaintiff between the vehicles. The issues on appeal involve the nature and effect of "a special and restricted release" releasing and discharging Matthew Meier from liability for the

personal injuries to the plaintiff but specifically reserving any and all claims which the plaintiff might have against Katherine Meier. The district court found that the release by operation of law discharged the liability of both Katherine and Matthew Meier and dismissed the action.

Following the accident of December 2, 1964, both Matthew Meier and Katherine Meier died. The plaintiff filed claims against both the estates and the claims were disallowed by the county court. Appeals were then perfected to the district court. While the cases were pending in the district court, the plaintiff, upon payment of $6,250, executed a "special and restricted release and indemnifying agreement" to Matthew Meier, deceased, which released and forever discharged Matthew Meier, deceased, his heirs, personal representatives, successors, and assigns, "and all other persons, firms or corporations, who are or who may be liable for any claims of any kind or character, demands, rights or causes of action of whatsoever kind or nature, foreseen and unforeseen, developed and undeveloped, especially because of bodily and personal injury to said Charles A. Dickey * * * reserving, however, all claims, demands and causes of action * * * against said Katherine Meier, deceased." The release also agreed to indemnify and hold harmless Matthew Meier, deceased, and his representatives and assigns "against loss from any further claims, demands or actions that may hereafter, at any time, be made or brought against them or either of them for the purpose of enforcing any further claim for damages, reimbursement, contributions, or otherwise * * * in consequence of said accident, it being understood that this includes particularly, any claims of Katherine Meier, deceased, her personal representatives, heirs * * *." A separate paragraph repeats the statement that the release is a special and restricted release releasing only Matthew Meier, deceased, his personal representatives and heirs and reserving any and all claims against Katherine Meier,

deceased, her personal representatives and heirs.

The action against the estate of Matthew Meier was thereafter dismissed with prejudice. In the action against the estate of Katherine Meier with which we are concerned, the foregoing release and settlement with Matthew Meier were established. The pleadings and answers to requests for admissions also establish that the only basis of liability against the estate of Katherine Meier rests on the doctrine of respondeat superior. There is no allegation or evidence of any independent negligence of Katherine Meier, the employer-principal, and the sole negligence was that of Matthew Meier, the employee-agent, who has been released and discharged.

The defendant moved for summary judgment on the basis of the pleadings and responses to requests for admissions. The motion was sustained by the trial court, and the action dismissed.

The plaintiff contends that under the circumstances here Matthew Meier and Katherine Meier were joint tort-feasors, and that in such a situation release and discharge of one joint tort-feasor on settlement and payment of damages is not a defense to an action against another unless it was agreed between the parties to the settlement that such payment was in full satisfaction of all damages suffered. Authority for the latter portion of plaintiff's contention rests on Fitzgerald v. Union Stock Yards Co., 89 Neb. 393, 131 N. W. 612. The rationale of that case has been consistently followed since. It is also in accord with Restatement, Torts, § 885(1), p. 460: "(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document." Tentative Draft, No. 16, Restatement, Torts 2d, dated April 24, 1970, changes that subsection to read: "(1) A valid release of one tortfeasor from liability for

a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it shall do so." Under either version, the specific reservation of the claims against Katherine Meier would give plaintiff the benefit of the rule if Matthew Meier and Katherine Meier were joint tort-feasors.

The critical factor, however, is that Matthew Meier and Katherine Meier were not joint tort-feasors under the facts here. Plaintiff relies on the case of S.M.S. Trucking Co. v. Midland Vet, Inc., 186 Neb. 647, 185 N. W. 2d 667, for the proposition that an employer is regarded as a joint tort-feasor having joint and several liability. Two or three other cases involving employers and employees in which similar statements are found are likewise relied upon. In each of these cases it is apparent that the employer could have been guilty of independent negligence. None of them fit the situation involved here where the liability of the employer-principal arises only by virtue of the doctrine of respondeat superior, and not through any independent negligence of the employer-principal. The employer-principal here was not a joint tort-feasor in the technical sense. Her liability was purely derivative, stemming from the sole negligence of the employee-agent, and resting upon the employer-principal only because of the doctrine of respondeat superior.

Courts generally have not made this distinction or have followed rules applicable to true joint tort-feasors even though recognizing the distinction. See Annotation, Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A. L. R. 2d 533, at page 536 et seq.

Where the doctrine of respondeat superior has been involved, many cases make no distinction between releases and covenants not to sue. There are also cases which can be cited in support of a great variety of interpretations as to the effect of a release by an employer or an employee on the liability of the other where

the cause of action is in tort and the liability is founded on the doctrine of respondeat superior.

Consideration of the many and divergent legal principles and the practical problems in multiplicity of litigation and in determining whether satisfaction was full or only partial, all lead us to the view adopted by most courts which have considered the issue. See Annotation, 20 A. L. R. 2d 1044. We hold that in a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or prinicpal from liability, even though the release specifically reserves all claims against the employer-principal. See, Max v. Spaeth, 349 S. W. 2d 1 (Mo.); Bacon v. United States, 321 F. 2d 880 (8th Cir.). Both courts held in those cases: "The master's liability under the doctrine of respondeat superior is based not on his own misdeeds but those of his servant, and therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable. It matters little how the servant was released from liability; as long as he is free from harm, it appears to us that his master should also be held blameless." Subject to exceptions not present here, the statement is applicable to this case.

The action of the district court was correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA EX REL. SOUTHEAST RURAL FIRE PROTECTION DISTRICT ET AL., APPELLEES, V. WILLIAM GROSSMAN ET AL., APPELLEES, BENNET RURAL FIRE PROTECTION DISTRICT, A MUNICIPAL CORPORATION AND BODY POLITIC, ET AL., INTERVENERS-APPELLANTS.

197 N. W. 2d 398

Filed May 12, 1972. No. 38208.

Judgments: Actions: Res Judicata. The conclusiveness of a prior

judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formally raised or not.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

William L. Walker and Earl Ludlam, for interveners-appellants.

Paul Douglas and Marti, O'Gara, Dalton & Bruckner, for appellees.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and WARREN, District Judge.

CLINTON, J.

This is an appeal by the interveners from an order overruling their motion for new trial following the issuance of a peremptory writ of mandamus by the district court for Lancaster County directing the county commissioners of Lancaster County, Nebraska, respondents in this mandamus proceeding, to comply with the judgment of the court in a prior proceeding in error, wherein the respondents were defendants. The prior error proceedings involved the review by the district court of an order of the board of county commissioners approving the merger of the Southeast Rural Fire Protection District and the Bennet Rural Fire Protection District. There are many questions raised by the interveners in this appeal but it is necessary to decide only one as that is determinative of the matters involved. Before that question is stated it will be useful to recite some of the background of the case.

In the year 1968 pursuant to the provisions of sections 35-514 and 35-516(2), R. R. S. 1943, petitions to

initiate the merger of the two fire protection districts were filed with the county clerk of Lancaster County, Nebraska. Thereafter following a hearing before the county commissioners that body entered an order approving the merger. That order was entered on December 17, 1968. We gather from the record that similar petitions had been filed with the county clerk of Otoe County in which at least part of one of the districts lies, but we are not here concerned with those proceedings.

From the order of the board of county commissioners of Lancaster County proceedings by petition in error were brought to the district court for Lancaster County. In that proceeding Siefert et al., interveners in this case, were petitioners in error and the relators herein, Ehlers et al., were defendants as were the two fire protection districts and the county commissioners who are respondents in this mandamus proceeding. Ehlers et al., and the interveners are residents and persons who have property assessed for taxes in one or the other of the two districts. Some of the interveners are officers of the Bennet district and successors to persons who were as such predecessor officers, parties in the error proceedings. Thus all parties to this mandamus action were parties to or virtually represented in the error proceedings.

In those proceedings many attacks were made upon the legality of the approval of the merger. Those included sufficiency of signatures to the petitions; inaccuracy of descriptions and boundaries; sufficiency of the certifications; legality of the action of the board of the districts; inadequacy or lack of notice of meetings; whether or not petitioners had withdrawn their signatures from the petition; deficiencies in the order of the county commissioners approving the merger; and others.

In the error proceedings the court entered judgment on October 15, 1970, in which it found it had jurisdiction of the parties and the subject matter; the order

of the county board was a final and appealable order; the board of county commissioners was not a state agency subject to the provisions of sections 84-901 to 84-919, R. R. S. 1943; and the "Order was not in proper form and failed to include the boundaries of the merged districts and that no proper written Order was filed in the office of the County Clerk. IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that these proceedings be, and hereby are, remanded to the Lancaster County Board of Commissioners and that such Board enter an appropriate order in conformity with Section 35-514, R. R. S. 1943, as amended, and that same be filed in the office of the County Clerk of Lancaster County, Nebraska."

The above order was not appealed from and became final. The county commissioners took no steps to comply with the order. The relators then brought this action to compel compliance. First an alternative writ and later a peremptory writ of mandamus were issued directing compliance. The interveners were denied intervention in the case until the commissioners announced that they would not appeal from the order overruling their motion for a new trial and then they were permitted to intervene for the purposes of this appeal. Denial of their earlier right to intervene is one of the assignments of error made here and which we do not decide because we will assume but not hold that they had a right to intervene. In their motion to intervene they raised substantially the same issues as were raised in the proceeding in error, and in addition alleged that the governing body of the Bennet Fire Protection District on September 2, 1970, enacted a resolution revoking its earlier resolution approving the petition, finding that the merger was in the best interest of the district, and transmitting the petition and the attachments to the county clerk. It is to be noted that the alleged revocation resolution was enacted while the error proceedings were pending and when jurisdiction

had already passed to the district court.

It is apparent that what the interveners seek to do in this mandamus action is to attack the judgment rendered in the error proceedings from which they did not appeal and the enforcement of which judgment is the purpose of this mandamus action. It appears to us that this appeal should be disposed of upon either of two principles: (1) Collateral estoppel preventing the interveners from attacking a judgment which is not void, or (2) res judicata. The general distinctions between collateral estoppel and res judicata are succinctly stated in Slater v. Skirving, 51 Neb. 108, 70 N. W. 493. If we view the mandamus proceeding as a cause of action separate from that which rose out of the merger proceedings and culminated in the judgment in the district court in the review on the petition in error then the attack is collateral and only a void judgment is subject to collateral attack. "Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.'" County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569. See, also, Restatement, Judgments, § 11a, p. 65. The judgment of the district court in the error proceedings was not void. That court had both jurisdiction of the subject matter and the parties, and it so found. Where the court has jurisdiction of the parties and the subject matter its judgment is not subject to collateral attack. Stanton v. Stanton, 146 Neb. 71, 18 N. W. 2d 654; Wistrom v. Forsling, 144 Neb. 638, 14 N. W. 2d 217; Clayton v. Evans, 137 Neb. 574, 290 N. W. 447; School Dist. D. v. School Dist. No. 80, 112 Neb. 867, 201 N. W. 964; Restatement, Judgments, § 10(1), p. 57; 49 C. J. S., Judgments, §§ 401, 402, pp. 792, 798.

On the other hand, the mandamus action may be properly viewed as simply a method of execution of

the previous judgment after it became final. State ex rel. Warren v. Raabe, 140 Neb. 16, 299 N. W. 338; State ex rel. Campbell v. Slavik, 144 Neb. 633, 14 N. W. 2d 186. When it is so viewed then the principle of res judicata seems to apply because the prior judgment is the foundation of the mandamus action and the mandamus a mere extension of it. We place our decision on grounds of res judicata. The applicable principle is that: "The conclusiveness of a prior judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formally raised or not." Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119. See, also, 50 C. J. S., Judgments, § 598, p. 16.

Interveners rely upon the proposition that mandamus does not lie to compel discretionary action of a board and this is of course correct. However, the approval of the merger by the board ended its discretionary powers. The direction of the court by its judgment to the board to recite the boundaries of the merged districts did not involve discretion. It must be borne in mind that the proceedings were for the merger of two existing districts whose boundaries were already fixed. The recital in an appropriate order of the boundaries of the merged districts was therefore only a formal matter not involving discretion.

AFFIRMED.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. FLOYD O. ALLEN, APPELLEE.

197 N. W. 2d 393

Filed May 12, 1972. No. 38222.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellant.

McGinley, Lane, Mueller, Shanahan & McQuillan and John A. Gale, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

PER CURIAM.

The question is whether an outgoing lessee of common school land possesses a compensable interest in 16,565 feet of conservation terracing by him under a lease dated January 9, 1956. The judgment of the district court declared that he possessed a compensable interest. The State Board of Educational Lands and Funds appeals.

The lessee possessed no compensable interest in the conservation terraces. The judgment is reversed and the cause remanded with directions to render a declaratory judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., concurring.

The lease obligated the lessee, Floyd O. Allen, to observe and carry out soil conservation requirements according to the rules and regulations of the board. Breach of the obligation was ground for cancellation. Allen terraced two fields in 1963 in compliance with the lease.

Statutory provisions in force on January 9, 1956, enumerated improvements for which an outgoing lessee might recover compensation. Conservation terraces were not named. See Laws 1953, c. 255, §§ 1 and 2, pp. 862 to

864; §§ 72-240.06 and 72-240.07, R. S. Supp., 1953. The list was exclusive under the facts of the present case. State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769 (1972); Banks v. State, 181 Neb. 106, 147 N. W. 2d 132 (1966). In 1957 the Legislature added conservation terraces to the list. See Laws 1957, c. 303, § 1, p. 1107; § 72-240.06, R. S. Supp., 1957.

The statutory provisions in force on January 9, 1956, determined the legal operation of the lease. See Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852 (1960). That proposition was beclouded by references in Banks v. State, *supra,* to legislation enacted in 1957. The references to the 1957 act were erroneous but irrelevant.

On January 9, 1956, conservation terraces did not appear on the statutory list of compensable improvements, and the addition in 1957 came too late to benefit Allen. I therefore concur that he possessed no compensable interest in the conservation terraces.

CLINTON, J., dissenting.

I dissent. I believe the Per Curiam opinion will create confusion in an area which Rosenberger settled and will appear (and in fact is) a flip flop such as I believe occurred in Banks v. State, 181 Neb. 106, 147 N. W. 2d 132; and State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599.

There are some areas where the rule of stare decisis and the consequent stability and certainty in the law are especially important. This is one of those areas. We know that there are a large number of pending cases involving the question. They can, however, encompass only a few categories. Until there is some stability in the area and the opinions of the court acquire consistency the litigation will continue.

The Per Curiam opinion in this case presents no reasons whatsoever. It therefore decides no law, but just the case. The concurring opinion which accompanies it presents what I believe is a mistaken reason. The foundation of that opinion is the statement: "The statu-

tory provisions in force on January 9, 1956, determined the legal operation of the lease." Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852, is cited. The proposition is abstractly correct but not as applied in this case. What Stoller really held was that the State could not *unilaterally* make changes in the lease adversely affecting the rights of the tenant. Syllabi 5 and 6 of Stoller are as follows: "5. The rights of a lessee of school lands are determined by the law as it was at the time the lease was made and the *lessee may not thereafter be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.* . . . 6. *The state* by entering into a contract abandons its attributes of sovereignty and *binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract.*" (Emphasis supplied.)

In this case the lease required that Allen follow conservation practices but without specifying what they were. In 1957 the Legislature made conservation terracing compensable. Thereafter the Board approved plans for conservation terracing by general regulation and required Allen under threat of forfeiture to do certain terracing which is here involved. This he did in reliance on the statute. All of this was a *bilateral change* in the lease contract made by the Board and the Legislature under their constitutional power of management and which changes were accepted by Allen. He clearly is entitled to compensation under the terms of his contract as amended by the statute and accepted by him.

In the Stoller case this court also said: "Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and *likewise true between individuals and the government.*" (Emphasis supplied.) I take it that no one would question that such "existing law" includes the Constitution. Article VII, section 1, says:

"The *general management* of all lands . . . shall be vested, *under the direction of the Legislature,* in . . . the Board of Educational Lands and Funds." (Emphasis supplied.) It can hardly be questioned that the Board and the Legislature have the same powers of management and the same duties that any other trustee has in the absence of some limiting provisions in the trust instrument (or here, in the Constitution).

The dissent in Rosenberger and the dissent in Banks completely ignore the "general management" provision of the Constitution. They ignore the unique nature of the "contractual" provisions which rise out of the statutes pursuant to the "management" power of the Constitution. The unique nature of the compensable interest of the lessee was completely analyzed and lucidly set forth in the concurring opinion of Carter, J., in the Banks case and need not be reiterated here.

Nowhere has it been pointed out how the duty of a trustee is violated when the trustee in effect says to the tenant (through the statutes) i.e., "When the lease is transferred or the land is sold, I will see to it that you are reimbursed by the new tenant or the purchaser, but only to the extent that your improvements have added to the value of the land and in no event to exceed your cost." These limitations upon reimbursement which found their genesis in the concurring opinion of Carter, J., in Banks and were later enacted by the Legislature into law, Laws 1967, c. 467, pp. 1452 to 1457; now §§ 72-240.10 to 72-240.24, R. R. S. 1943, and further defined and limited in Rosenberger, completely protects the trust corpus from invasion.

The improvements which the Legislature and the Board required or encouraged the tenant to make in order to make the land productive was simply carrying out the management powers under the Constitution and the provisions for reimbursement as limited by statute and the opinions of this court are clearly within the ordinary powers of a trustee. There is no principle of

trust law which requires a trustee to unjustly enrich itself or to take unconscionable or technical advantage. A trustee within its authority is bound by its contracts just as much as any other person.

The Restatement of Trusts sets forth pretty much the common law of trusts and to establish my point I will make reference thereto. I find no Nebraska cases contradicting the principles I will cite. While a trustee is personally liable to those with whom he deals in administering the trust, he is entitled to indemnity out of the trust estate if liability was properly incurred by him. Restatement, Trusts 2d, § 261, p. 2. Creditors may reach the trust property by proceeding in equity. Restatement, Trusts 2d, § 267, p. 12. Sections 169 to 196, Restatement, Trusts 2d, set forth pretty generally the powers of the trustee and I will make reference to some of them. The trustee must exercise the same care and skill as a man of ordinary prudence would exercise in dealing with his own property. Restatement, Trusts 2d, § 174, p. 379. He has the duty to use reasonable care and skill to preserve the trust property. Restatement, Trusts 2d, § 176, p. 381. He has a duty to make the trust property productive. Restatement, Trusts 2d, § 181, p. 391. He has such powers as "are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." Restatement, Trusts 2d, § 186, p. 399. He is in his discretionary powers "subject to control by the courts" only for an abuse of discretion. Restatement, Trusts 2d, § 187, p. 402. He has the power to lease "for such periods and with such provisions as are reasonable." Restatement, Trusts 2d, § 189, p. 412.

The legislative act amending the statute to include conservation terraces was enacted in 1957. The terraces were constructed by Allen in 1963. They are a compensable improvement under the Laws of 1957, chapter 303, section 1, page 1107. The record here establishes that they were authorized improvements in

fact. There was here the same kind of consent which existed in Banks. In any event they are not one of the listed improvements where consent was required.

The Constitution entrusts to the Board of Educational Lands and Funds and the Legislature "general management" of the trust lands. Pursuant to that power of management the Board required "conservation terracing" and the Legislature authorized compensation from the new purchaser on the making of a lease to a new lessee or sale of the lands. In reliance upon the direction of the Board and the statute, the lessee constructed the terracing. This amounts to a mutual amendment of the contract. Allen clearly has a compensable interest under the Constitution and the statute.

BOSLAUGH and MCCOWN, JJ., join in this dissent.

MIDLANDS TRANSPORTATION COMPANY, A CORPORATION, APPELLEE, V. APPLE LINES, INC., A CORPORATION, APPELLANT.
197 N. W. 2d 646

Filed May 12, 1972. No. 38223.

1. **Contracts: Sales: Damages.** The amount recoverable for a breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach.
2. **Contracts: Damages.** The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
3. **Contracts: Trial: Damages: Evidence.** Plaintiff must not only show in a breach of contract case his right of recovery, but the elements and facts which compose the measure of his recovery, and not leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation.
4. **Trial: Damages: Evidence.** It is the duty of the district court to refrain from submitting to a jury the issue of damages

when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture.

5. **Contracts: Trial.** A contract restraining a person from establishing a business competitive with that of the other party to it is strictly construed and doubts are resolved against the latitudinarian construction thereof.
6. **Contracts: Lessor and Lessee.** The mere leasing of personal property, without proof of other circumstances, by a covenantor to an existing competitor of a promisee, does not constitute a breach of a general covenant not to compete.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Stern, Harris, Feldman, Becker & Thompson, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Kermit A. Brashear, II, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and WARREN, District Judge.

WHITE, C. J.

This is a suit on a promissory note, but the real issue presented is the sufficiency of the evidence to submit the questions of liability and damages to a jury for the alleged breach by the plaintiff of a covenant not to compete with the defendant. These issues were raised by the cross-petition of the defendant and the district court, holding that there was insufficient evidence to submit the case to a jury, directed a verdict for the plaintiff on the promissory note originally sued upon. We affirm the judgment of the district court.

The controversy here rose on an agreement by Apple Lines, Inc., hereinafter referred to as Apple, to purchase a portion of an I. C. C. Certificate of Public Convenience and Necessity held by Midlands Transportation Company, hereinafter referred to as Midlands. Apple paid $5,000 when the agreement was made, in May 1967, and executed a negotiable promissory note for $22,000 for the balance of the purchase price. Apple

was a petroleum products carrier from Kansas City, Missouri, north to Omaha, Nebraska. The purchase of Midlands' authority was to make the return trip south to Kansas City more profitable by trucking malt beverages from Omaha south to the Kansas City area. After a period of operation on a grant of temporary authority, the I. C. C. approved the agreement and the transfer of the relevant portion of Midlands' certificate was made. Midlands also agreed that it would not compete with Apple in the transportation of any commodity in any area covered by the transferred authority for a period of 5 years from the date of the transfer.

Was there competent evidence to submit the issue of damages on Apple's cross-petition? The proper measure of damages with regard to breach of a covenant not to compete was established by this court in Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245 (1953), wherein it was said: "Speaking broadly, the amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach.

"The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. See Western Union Tel. Co. v. Wilhelm, 48 Neb. 910, 67 N. W. 870." Admittedly, damages in such a case cannot be proved with mathematical certainty. There must be some basis for computation of either a general loss to the business or a loss of profits. Apparently, from the pleadings, the cross-petitioner, Apple, asserts both aspects in its theory of recovery. In a quite recent case, relied upon by Apple in its brief, this court said as follows as to the measure of damages in an action for the loss of goodwill: "In an action at law for the loss of goodwill, the evidence must contain *sufficient*

data to enable a jury, with a reasonable degree of certainty and exactness, to estimate the actual damages." (Emphasis supplied.) Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 137 N. W. 2d 701.

The case of McGinnis v. Hardgrove, 163 Mo. App. 20, 145 S. W. 512 (1912), was concerned with an action against a seller for violation of an agreement not to compete in a livery business. Plaintiff testified that his gross receipts amounted to $8 to $10 a day before defendant began to compete but that subsequent to such competition his gross receipts amounted to only $4 or $5 a day. There was no evidence as to plaintiff's business expense except the fact that he merely paid expenses when his gross receipts diminished. With language extremely applicable to the instant situation the court discussed the plaintiff's burden in such an instance: "Plaintiff must not only show in such a case his right of recovery but the elements and facts which compose the measure of his recovery and not leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation."

Summarizing these authorities the more precise question before us is not whether there is any competent evidence in the record to show that the damages are capable of mathematically exact measurement, but whether there is sufficient evidence and data to enable the trier of fact, the jury, with a reasonable degree of certainty and exactness to estimate the actual damages. Turning to the record we find that there is evidence that Midlands' gross income from the operation of the malt beverage authority was approximated, but that there is no competent evidence anywhere in the record as to Apple's gross income from said operation either prior to or after the effects of the alleged breach of the contract not to compete. The damage which Midlands' was allegedly responsible for was based primarily on the loss of a major user of Midlands' services soon after the sale to Apple. Without producing any

records or books of the company, Apple's general manager testified that the loss of this customer reduced Apple's gross income "about $650 per week" from sometime near the end of 1967 until the trial date of June 3, 1971. However, the record shows that the same witness went on to testify that Apple had continued to operate under the beverage authority with other customers and had made a profit, but due to the destruction of the company records in an untimely fire, he could not testify as to the amount or the extent of the profits from the whole malt beverage operation. There was also evidence that Apple invested in new refrigerated trailer units. There is no evidence of pecuniary loss, no dollar figures to show any degree of loss on this investment, and none at all to show any direct connection with the claimed loss of the one customer due to the breach of the covenant not to compete. Summarizing, the only competent evidence in terms of dollars is that Apple realized approximately $650 gross per week from servicing the Schatz account and that it spent approximately $80,000 for the acquisition of new refrigerated trailer units to be utilized *generally* in its common carrier business. More precisely, and in accordance with the trial court's finding on this issue, the record is wholly void of any basis for arriving at the most elementary computation as to the difference between Midlands' per annum gross in the operation of the malt beverage authority and Apple's per annum gross in the operation of the same. On the other hand, the testimony of Apple's general manager substantiated the fact that the malt beverage authority purchased from Midlands was operated at a profit. It is clear that the additional essential facts necessary to a computation of damages are not present in the record. The evidence does not reflect the present gross of Apple in the operation of the malt beverage authority. And, while acknowledging that it realized a profit, there is no evidence in the record showing in

dollar figures what such profit was. More important, nowhere in the evidence are Apple's expenses or any delineation of the relationship between overhead and gross presented; nor is there any evidence of the present value of the equipment which Apple claims to have purchased for the purpose of the operation of the malt beverage authority. Nothing but conjecture or speculation could guide the jury in making any determination as to how and in what manner the acquired equipment is used in relationship to the other aspects of Apple's common carrier business. We observe further that nowhere in the record does there appear any rational method or basis for the computation of Apple's claimed damage. The jury would be left to pure speculation to find the loss of the Schatz account as being the proximate cause of any unknown and unproved yet pecuniary loss, either a general one or from loss of profits.

It is true that Apple was prevented from the proper presentation of its case on damages due to the fact that the relevant documents and evidence were lost when fire destroyed the company office building. This explains but obviously does not excuse Apple's failure to sustain its burden of proof on the issue of damages. It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture. Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254. To submit the issue of damages in this case to the jury would be to "leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation." See McGinnis v. Hardgrove, *supra*. The determination of the trial court not to submit Apple's cross-petition to the jury is sustained on this ground alone.

We turn to the issue of liability. The evidence adduced by Apple clearly establishes that no more than

one truck at a time that was titled in the name of "Midlands" was leased by it to a competing common carrier with malt beverage authority from November 13, 1967, to July 21, 1968, which period of time was approximately subsequent to the loss of the Schatz account by Apple.

It appears that the majority and proper rule is that the mere leasing of personal property, without proof of other circumstances, by a covenantor to an existing competitor of a promisee, does not constitute a breach of a general covenant not to compete. Apple premises its argument mainly upon the case of Dowd v. Bryce, 95 Cal. App. 2d 644, 213 P. 2d 500, 14 A. L. R. 2d 1329, and J. D. Nichols Stores, Inc. v. Lipschutz, 120 Ohio App. 286, 201 N. E. 2d 898. We feel that the better rule, both on reason and authority, is stated in the later case of Wineteer v. Kite, 397 S. W. 2d 752 (Mo. App., 1965), wherein the court in discussing the Dowd and the Nichols cases said as follows: "Although it was clearly obvious to the court that sales of land were expressly barred by the covenant and that the lesser act of leasing could have well been implied to be a prohibited act, the court did not choose to make its determination on that basis. Instead, it reached the conclusion that the parties did not intend that plaintiff would be permitted to lease his property for the purpose of competition *on the independent ground that such lease constituted indirect competition.*

"On its face the Dowd opinion appears to be supporting authority in defendants' favor. However, the decision of the court, founded as it is on the basis of competition instead of the clearly expressed covenant restriction against selling, has been criticized in 14 A. L. R. 2d 1333, Annotation, Contract Not to Compete - Lease, by editorial comment reading in part as follows:

" 'There can be hardly any doubt that the decision in Dowd v. Bryce * * * is correct under the circumstances. The inclusion in the restrictive covenant of the provi-

sion against selling other property to future competitors shows the intention of the parties as to the scope of the prohibited activities clearly. It is more difficult, however, to justify the decision on the ground that the lease amounts to indirect competition by the lessor. While the arguments advanced by the court in favor of this viewpoint are of considerable force, the decision seems to go further in restricting the seller in his business activities than most cases involving similar situations. * * * Thus, it has been held generally that there is no breach of the covenant where the covenantor *merely lends money to a person engaged in a similar business, or where or where the covenantor sells land to another who erects a building thereon for the purpose of carrying on the business.* On the other hand there is a breach of the covenant where the covenantor engages in the business as a partner, *organizes a competing corporation, or otherwise engages in a similar business under corporate form, or takes active interest in the encouragement of the business in other ways.*

" 'Without endeavoring to lay down any general principles it may be suggested *that only such conduct by the covenantor constitutes a breach of the agreement which amounts to an active participation on his part in the running of the competitive business even though this activity is conducted by indirect means.*'

"We have found only one instance in which the Dowd case has been approved or followed as authority on the specific question here considered. In the Ohio Case, J. D. Nichols Stores v. Lipschutz, 120 Ohio App. 286, 201 N. E. 2d 898, the court adopted the reasoning of Dowd and also held that a seller of a business violates his agreement to refrain from competition, per se, and without any other act on his part, by leasing other premises for purposes of a similar business. In its effect this holding amounts to an extension or redeclaration of the Dowd case ruling and would be subject to the same

critical examination that the Dowd result has undergone." (Emphasis supplied.)

In accord with the authority and reasoning of the Wineteer case, see Adams v. Adams, 156 Neb. 778, 58 N. W. 2d 172; Ericson v. Jayette, 149 Fla. 82, 5 So. 2d 453; McKeighan Wachter Co. v. Swanson, 138 Wash. 682, 245 P. 10, affirmed on rehearing, 141 Wash. 694, 250 P. 353; Houston Transfer & Carriage Co. v. Williams, 201 S. W. 712 (Tex. Civ. App., 1918), reversed on other grounds, 221 S. W. 1081 (Tex. Comm. App., 1920); Management, Inc. v. Schassberger, 39 Wash. 2d 321, 235 P. 2d 293.

In Nebraska, although we have no case directly on the question of whether a lease to a competitor constitutes a breach of a covenant not to compete, our court in Adams v. Adams, *supra,* stated the correct approach to the interpretation of a covenant restricting competitive freedom, when it stated as follows: "A contract restraining a person from establishing a business competitive with that of the other party to it is strictly construed and doubts are resolved against the latitudinarian construction thereof."

As we have pointed out, basically, Apple relies solely upon the leasing of equipment to an active competitor, in order to sustain its claim of the breach of an agreement to not compete. There is no evidence to show that Midlands organized a competing corporation, or directly or indirectly engaged in a similar business under corporate form, or otherwise took an active interest in the encouragement of the competitive business. Though each case must be judged upon its particular facts and circumstances, it is clear that generally the mere lease of personal property by covenantor to a previously existing competitor of the covenantee does not constitute a violation of a general covenant not to compete. Accordingly, we hold in this case that the contention the lease of the equipment to an active competitor was a violation of a covenant not to compete must fall and the trial

court's direction of a verdict on the cross-petition is sustainable on this ground alone.

The district court correctly determined that the defenses and alleged set-off of Apple are without merit as a matter of law. Accordingly, Midlands' motion for a directed verdict as to its petition and motion to dismiss as to Apple's cross-petition were properly sustained and the motion for summary judgment on the promissory note was correctly granted thereafter. The judgment of the district court is correct and is affirmed.

AFFIRMED.

IN RE INTERESTS OF PAMELA DENISE ANDERSON ET AL., CHILDREN UNDER EIGHTEEN YEARS OF AGE.
ETHEL ANDERSON, APPELLANT, V. GORDON E. DOESCHOT, CHIEF PROBATION OFFICER, APPELLEE.
197 N. W. 2d 384

Filed May 12, 1972. No. 38227.

Parent and Child: Infants: Trial: Appeal and Error. An order of the juvenile court regarding the custody of children will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

McGrath, North, Nelson, Shkolnick & Dwyer, for appellant.

Donald L. Knowles, Colleen R. Buckley, and Roger R. Holthaus, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

BOSLAUGH, J.

This is an appeal by Ethel Anderson from an order of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights to two minor

children. The children, born July 17, 1966, and November 7, 1968, have separate fathers and were born out of wedlock.

On April 7, 1970, the juvenile court found the children were dependent and neglected and terminated the parental rights of each father. The parental rights of the appellant were not terminated but the children were placed in the temporary custody of the Douglas County welfare administration. The appellant was granted reasonable visitation privileges including weekend privileges. The matter was continued until July 2, 1970, and the appellant was ordered to find a suitable home for the children; obtain suitable employment; and keep the juvenile court informed of her whereabouts and her address.

Further continuances were granted at the request of the appellant, and on January 8, 1971, the appellant was ordered to appear April 8, 1971, and demonstrate her fitness to have the children returned to her custody.

On March 22, 1971, a supplemental petition was filed alleging the appellant had visited the children only 6 times since December 31, 1969; the appellant had failed to obtain and hold gainful employment and had failed to provide a suitable home for the children; the appellant had been convicted of petit larceny on April 16, 1970, and of carrying a concealed weapon on July 2, 1970; and the parental rights of the appellant should be terminated. On May 6, 1971, the juvenile court found that the parental rights of the appellant should be terminated and placed the custody of the children in the Department of Public Welfare, State of Nebraska. From this order the appellant has appealed.

At a hearing on April 8, 1971, Flora Rollerson, a foster mother who had taken care of the children since March 1970, testified that the appellant had visited the children 7 or 8 times in the past year. The appellant had not visited the children since Christmas in 1970.

William Webb, an employee of the Douglas County

social service, testified as to his difficulty in trying to locate the appellant. The appellant had lived with friends and did not maintain an apartment or home of her own. The appellant had been employed by 4 different employers but only for relatively short periods of time.

The appellant's testimony disclosed that she had not rented an apartment until the day of the hearing or several days before. Her testimony conflicted in some particulars with that of the witnesses called by the county attorney but there was no substantial dispute as to the material facts alleged in the supplemental petition.

At the hearing on May 6, 1971, the chief adult probation officer for Douglas County testified that the appellant had failed to comply with the terms of a probation order entered on July 28, 1970. At this hearing the appellant's counsel stated the appellant was having some health problems and requested that final disposition of the matter be continued. The juvenile court refused this request and terminated the appellant's parental rights to the children.

An order of the juvenile court regarding the custody of children will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. State v. Randall, 187 Neb. 64, 187 N. W. 2d 586. The appellant failed to comply with the order of April 7, 1970, and demonstrated her inability to care for the children. The record sustains the findings and order of the juvenile court.

The order of the separate juvenile court is affirmed.

AFFIRMED.

FRANCIS J. MELANSON, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, ET AL., APPELLEES.
197 N. W. 2d 401

Filed May 12, 1972. No. 38250.

1. **Motor Vehicles: Administrative Law. The points to be assessed**

by the Director of Motor Vehicles for a speeding violation are determined by the amount by which the limit was exceeded.

2. **Motor Vehicles: Administrative Law: Trial: Statutes.** The amount by which the limit was exceeded is not an essential element of the offense of speeding, but the point system statute requires that the magistrate or judge make such a finding. The finding is a part of the information to be shown on the abstract for conviction.

3. **Criminal Law: Administrative Law: Guilty Plea.** A plea of guilty permits a finding conforming to the allegations of the complaint.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is an appeal from an order of the Director of the Department of Motor Vehicles revoking the driver's license and operating privilege of the plaintiff for 1 year under section 39-7,129, R. R. S. 1943. The plaintiff appeals from an order of the district court affirming the order of the director.

The record shows the plaintiff was convicted of 4 charges of speeding and 1 charge of following another vehicle too closely within a period of 2 years. The director assessed a total of 11 points on the speeding charges and 2 points on the charge of following another vehicle too closely. The plaintiff contends there is no basis upon which the director could assess more than 1 or 2 points for each speeding conviction because the offense consists only of exceeding the applicable limit and the amount by which the limit was exceeded is not an element of the offense.

Under section 39-7,128, R. R. S. 1943, the points assessed by the director for a speeding violation are determined by the amount by which the limit was exceeded. Westenburg v. Weedlun, 187 Neb. 679, 193 N. W. 2d 566. One point is assessed if the driver did not exceed the limit by more than 5 miles per hour; 2 points if his speed was more than 5 but not more than 10 miles per hour over the limit; and 3 points if his speed exceeded the limit by more than 10 miles per hour.

The precise amount by which the limit was exceeded is not an essential element of the offense of speeding. To support a conviction for speeding it is necessary only that the evidence show the limit was exceeded. But the point system statute requires an additional finding by the magistrate or judge in a speeding case and this finding is to be included in the abstract of conviction sent to the director. This is apparent when the applicable sections are considered and construed together. It is a part of the "necessary information" as to "the nature of the offense" which is to be included in the abstract for conviction report. § 39-796, R. S. Supp., 1969. See, Richard v. Holliday, 261 Iowa 181, 153 N. W. 2d 473; State v. Bookbinder, 82 N. J. Super. 179, 197 A. 2d 35; Chappelle v. Board of Commissioners of District of Columbia (Muni. Ct. of App., D. C.), 110 A. 2d 697.

All of the speeding convictions involved in this case were based upon pleas of guilty. Each complaint charged a particular speed in excess of the applicable limit. The complaints alleged 70 miles per hour in a 60-mile-per-hour zone; 78 miles per hour in a 65-mile-per-hour zone; 46 miles per hour in a 30-mile-per-hour zone; and 48 miles per hour in a 30-mile-per-hour zone. The plea of guilty to each charge permitted a finding conforming to the allegations of the complaint. Stewart v. Ress, 164 Neb. 876, 83 N. W. 2d 901.

The abstracts which are in evidence show findings based upon the complaints and the pleas of guilty. Upon

receipt of the abstracts showing an accumulation of 12 or more points within 2 years, the director was required to suspend the plaintiff's license and operating privilege. Westenburg v. Weedlun, *supra*.

The judgment of the district court was correct and it is affirmed.

AFFIRMED.

CHARLES J. HARNETT, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

197 N. W. 2d 375

Filed May 12, 1972. No. 38265.

1. **Appeal and Error: Records: Evidence.** In a proceeding in error, the review is solely upon the record made by the tribunal whose action is being reviewed. No new facts or evidence can enter into the consideration of the court.
2. **Appeal and Error: Records: Evidence: Administrative Law.** Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

Herbert M. Fitle, James E. Fellows, and Warren C. Schrempp and J. William Gallup of Schrempp & Bruckner, for appellants.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Stephen Greenberg, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is a proceeding in error to review an order of the personnel board of the City of Omaha, Nebraska,

dismissing Charles J. Harnett, a patrolman, from the Omaha police department. The trial court set aside the order of the personnel board and ordered the plaintiff Harnett reinstated. The City of Omaha et al., and Richard J. Dinsmore, a taxpayer, have appealed.

On September 5, 1970, the plaintiff arrested Eileen M. Waites, an 18-year-old girl, for abusing an officer. At the time of the offense the girl was a passenger in the back seat of an automobile operated by Laura Waites. The plaintiff's report stated that in making the arrest he had attempted, unsuccessfully, to break a window of the automobile with the butt of a shotgun.

On September 22, 1970, the chief of police suspended the plaintiff from duty for 30 days for violating a rule of the police division, department of public safety. The rule provided that no officer should abuse, orally or physically, any person in his custody, or any other person, during the performance of his duty, and should use only such force as was reasonably necessary.

The plaintiff appealed to the personnel board. At the hearing before the personnel board, three occupants of the automobile testified that when the plaintiff was unable to break the automobile window, he pointed the gun at the window and ordered the occupants to unlock the door. When the door was unlocked, the plaintiff opened the door and struck Eileen Waites in the face with the butt of the gun. Later that night, after she had been released from jail, Eileen Waites was treated at St. Joseph's Hospital for a hairline fracture of her cheekbone.

The plaintiff testified that Eileen Waites had shouted obscenities at him after he directed the driver to turn around and go north on Twenty-fourth Street. He then "tapped" on the rear window of the automobile with the butt of the shotgun. When the door was opened, he told Eileen Waites she was under arrest. Eileen Waites started screaming and kicking at him and it was necessary for him to pull her from the rear seat of

the automobile to complete the arrest. The plaintiff testified he did not strike Eileen Waites with the gun or point it into the car. He had no explanation as to how her cheekbone was fractured and indicated it was not incident to the arrest.

The personnel board also considered the special report file concerning the plaintiff which had 31 entries dating from December 6, 1967, to this incident on September 5, 1970.

The case was tried in the district court as though proceedings before the personnel board were subject to review by trial de novo. No statute or other authority has been cited which would permit a de novo review in the district court. The Administrative Procedure Act, cited by the plaintiff, provides only for a review on the record of the agency (§ 84-917 (5), R. R. S. 1943). The statute is applicable only to agencies of the state. § 84-901, R. R. S. 1943.

The procedure which is applicable to a proceeding in error is well established. It is discussed in detail in Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49. The review is solely upon the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into the consideration of the court. Moser v. Turner, 180 Neb. 635, 144 N. W. 2d 192. If the board acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be sustained. Lynch v. City of Omaha, 153 Neb. 147, 43 N. W. 2d 589. See, also, Lewis v. City of Omaha, 153 Neb. 11, 43 N. W. 2d 419; First Nat. Bank & Trust Co. v. Ley, 182 Neb. 164, 153 N. W. 2d 743; Ostler v. City of Omaha, 179 Neb. 515, 138 N. W. 2d 826.

In this case there was no contention that the board exceeded its jurisdiction. The evidence before the personnel board was conflicting, but the credibility of the witnesses was a question for the board. There was competent evidence to sustain the findings and order

of the board and its order should have been affirmed.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment affirming the order of the personnel board.

REVERSED AND REMANDED WITH DIRECTIONS.

ANDREW R. MOATS, ADMINISTRATOR OF THE ESTATE OF MARVIN A. MOATS, DECEASED, APPELLEE, V. ARNOLD C. LIENEMANN, ADMINISTRATOR OF THE ESTATE OF JOHN B. LIENEMANN, DECEASED, APPELLANT.

197 N. W. 2d 377

Filed May 12, 1972. No. 38290.

1. **Trial: Evidence.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. **Trial: Evidence: Motions, Rules, and Orders.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Trial: Evidence: Negligence.** In determining the question of whether the evidence is sufficient to submit the issues of negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence are for a jury.
4. **Verdicts: Evidence: Appeal and Error.** A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.
5. **Witnesses: Evidence.** Hypothetical questions propounded to an

expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.

Appeal from the district court for Pierce County: MERRITT C. WARREN, Judge. Affirmed.

Healey, Healey, Brown & Burchard, Deutsch & Hagen, Thomas H. DeLay, and Mark A. Buchholz, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, Hutton, Hutton & Garden, and Richard H. Williams, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

CHADDERDON, District Judge.

This is an action by Andrew R. Moats, administrator of the estate of Marvin A. Moats, deceased, hereinafter called plaintiff, against Arnold C. Lienemann, administrator of the estate of John B. Lienemann, deceased, hereinafter called defendant, for the wrongful death of Marvin A. Moats as a result of a collision of a car driven by Marvin A. Moats and a car driven by John B. Lienemann. Marvin A. Moats, deceased, will be hereinafter called Moats, and John B. Lienemann, deceased, will be hereinafter called Lienemann. The jury returned a verdict for plaintiff for $46,037.12. We affirm the judgment of the district court.

Assignments of error Nos. 1, 2, 3, 4, and 5 go to the sufficiency of the evidence and will be considered together. In considering these assignments of error we must look to the former decisions of this court. In Lund v. Mangelson, 183 Neb. 99, 158 N. W. 2d 223, the court said: "In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof

is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

"A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523."

In Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389, this court said: "In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury."

In Wright v. Haffke, *ante* p. 270, 196 N. W. 2d 176, the court said: "'A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.' Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124."

The autopsy revealed that Lienemann died as a result of a ruptured aorta probably caused by broken ribs, and that he had a blood clot in the brain which had been there before the accident occurred.

The defense of the defendant was that Lienemann was suddenly stricken by illness, which he had no reason to anticipate, while driving an automobile, which rendered it impossible for him to control the car and is, therefore, not chargeable with negligence. The defend-

ant argued that the basis for the jury verdict was the result of speculation and conjecture.

The jury could have found from the evidence that Lienemann was driving his car north on U.S. Highway No. 81 north of Norfolk, Nebraska, at approximately 8:45 p.m. The road was concrete paved, 24 feet wide, dry, and with a slight incline from the south to the north. At a point approximately 3 miles north of Norfolk the right wheels of Lienemann's car left the pavement on the east side for .3 mile when the left side of the car left the pavement. The car continued in the ditch for some distance where it jumped a drainage ditch and was in the air for 42 feet. It continued on some distance where it grazed a fence on the east side of the ditch, then veered to the west onto the pavement, and never again left the paved surface from that point to where it struck head-on the car of Moats, which was a distance of 3,800 feet. As a result of the accident both Moats and Lienemann were killed. After Lienemann's car returned to the pavement, it continued north in the west lane and at least the driver of one car avoided it by going on the shoulder of the road. Just before Lienemann's car came to a control ditch bridge it turned to the east lane and passed a car, the driver of which had stopped it on the bridge and had started to back up because he had seen Lienemann's car in his lane of traffic. Lienemann's car continued north across a bridge of the North Fork of the Elkhorn River to a point a short distance south of a road which is the boundary between Madison and Pierce Counties where it turned into the west lane. A car he was meeting swerved to the east lane to miss his car, and then Lienemann's car ran head-on into Moat's car at a point .1 mile north of the county line road. From the place the right wheels of Lienemann's car first left the paved surface to the point of impact it was at least 1.2 miles.

The medical testimony regarding the ability of Lienemann to control his car is conflicting, but the jury could

have found from this testimony that in order to drive the car the distance of 3,800 feet from the place where he returned to the highway after being in the ditch and not thereafter having left the 24-foot paved road, he had the ability to control the car, which would include the ability to stop the car, and that such action on his part is evidence of negligence.

In the light of the cited cases and the evidence we find that the trial court did not err in overruling the defendant's motion for directed verdict at the end of the testimony, for judgment notwithstanding the verdict, or for a new trial, and that the verdict was not contrary to the evidence and to the law.

Assignments of error Nos. 6, 10, 11, and 12 are the claimed errors of the trial court in sustaining objections to questions on cross-examination. These questions were either argumentative, did not reflect a true statement of the evidence by other witnesses, or were indefinite, and the law is so firmly established on these points that it does not require the citation of cases thereon.

Assignments of error Nos. 7, 8 and 9 have to do with hypothetical questions asked by the plaintiff of the doctors and the overruling of objections to these questions by the trial court. In considering these assignments we must consider the case of Jacobson v. Skinner Packing Co., 118 Neb. 711, 226 N. W. 2d 321, wherein the court said: " 'Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.' " Without going into detail regarding these questions, we find that they fairly and reasonably reflected the facts proved by the other witnesses in this case, and that the trial court was not in error in overruling the objections to these questions.

In his brief the defendant cites Jacobson v. Skinner Packing Co., *supra*, and Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321.

In Jacobson v. Skinner Packing Co., *supra,* the court found: the witness "was not shown to have proper information upon which to base an estimate . . .." In Brugh v. Peterson, *supra,* in ruling on an answer to a hypothetical question as to the speed of a vehicle, the court said: ". . . the expert opinion depends upon the resolution of so many variables that it is, in effect, a statement of a possibility. Under the circumstances in this case the expert testimony was neither necessary nor advisable as an aid to the jury."

We find that this case was fairly and impartially tried, that the verdict of the jury was based upon sufficient evidence to find for the plaintiff, and that the verdict of the jury was not the result of speculation or conjecture.

AFFIRMED.

JACK LEE LOVEALL ET AL., APPELLEES, V. MARJORIE A. R. LOVEALL, APPELLANT.
197 N. W. 2d 381

Filed May 12, 1972. No. 38297.

1. **Divorce: Parent and Child: Domicile.** A court which has personal jurisdiction of the parties, both of whom are domiciled within the state, may determine the custody of a child as between the parties even though the child is absent from the jurisdiction.
2. ———: ———: ———. A court which has personal jurisdiction of the parties may determine the custody of a child as between the parties although the child is neither domiciled nor present in the state.
3. **Habeas Corpus: Parent and Child.** In a habeas corpus proceeding to determine the custody of a child the prime consideration is the welfare of the child.
4. **Judgments: Parent and Child: Comity.** Ordinarily, effect will be given to a prior judgment of another state determining the custody of a child as a matter of comity unless a change in circumstances requires a different result.

Appeal from the district court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Christensen & Glynn and Lawrence C. Sandberg, Jr., for appellant.

F. W. Carstens of Carstens & Carstens, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is a proceeding in habeas corpus by Jack Lee Loveall, Marion Loveall, and Rowena Loveall to obtain the custody of Jack Lee Loveall, Jr., a minor. Jack Lee Loveall, who will be referred to as the plaintiff, is the father of the child. Marion Loveall and Rowena Loveall are the parents of the plaintiff. The defendant, Marjorie A. R. Loveall, is the mother of the child. She has since remarried and her name is now Brecht.

The plaintiff and the defendant were married on January 29, 1965. Jack Lee Loveall, Jr., was born July 4, 1965. On July 22, 1970, the plaintiff commenced an action for divorce in Colorado. Both parties were then residents of Colorado, and personal service was had upon the defendant. Later the defendant filed an answer and counterclaim and was represented by counsel throughout the Colorado divorce proceedings.

The defendant appeared in person at a hearing on temporary custody, alimony, and support on December 9, 1970. Upon a stipulation of the parties, the Colorado court granted temporary custody of Jack Lee Loveall, Jr., to Marion Loveall and Rowena Loveall. The defendant did not comply with this order and moved to Beatrice, Nebraska, on December 23, 1970.

On January 26, 1971, the plaintiff was granted a final decree of divorce by the Colorado court. On June 14, 1971, the Colorado court found that "the defendant is *not* a fit and proper person to have the care, custody and control of the minor child, Jack Lee Loveall, Jr.," and awarded the custody to the plaintiff and his parents jointly. The defendant refused to surrender the

child to the plaintiff. This action was commenced on August 24, 1971.

The trial court found the Colorado court had jurisdiction of the parties and the minor child; the Colorado decree should be considered as a matter of comity; the plaintiff and his parents were fit persons to have the custody of the child; and there had not been a change in circumstances sufficient to justify granting custody to the defendant. The defendant has appealed.

The defendant contends that the Colorado decree as to child custody was void because at the time the divorce proceedings were commenced the child was in Nebraska and the defendant was not domiciled in Colorado. The issue raised was a question of fact.

After a separation in 1968, the parties lived together in Des Plaines, Illinois. A second child, Robert Lee Loveall, was born on February 4, 1969. At the temporary custody hearing on December 9, 1970, the Colorado court determined that the plaintiff was not the father of Robert Lee Loveall.

The parties moved back to Denver, Colorado, in June 1969. They separated again in October 1969, and the defendant moved to Nebraska. In June 1970, the defendant returned to Colorado with the children and the parties lived together for a short time. On July 11, 1970, the children were taken to Beatrice, Nebraska, by defendant's parents. The evidence indicates that this was intended to be a temporary visit, but Jack Lee Loveall, Jr., was never returned to Colorado. The defendant remained in Colorado until December 23, 1970, when she moved to Beatrice, Nebraska. Although there is some conflict in the evidence, we think it sustains the finding of the trial court that the defendant was domiciled in Colorado at the time the divorce action was commenced. See Restatement, Conflict of Laws 2d, § 79, Comment c, p. 239, stating that a court with personal jurisdiction of the parties may determine custody of a child as between the parties although the child is

neither domiciled nor present in the state.

The defendant complains that the trial court decided the case on the ground that the Colorado decree should be recognized as a matter of comity and not on the basis of the best interests of the child. That is not an accurate summarization of the trial court's decision, but it is not important because the matter is here for review de novo. State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615.

In a habeas corpus proceeding to determine the custody of a child the prime consideration is the welfare of the child. Copple v. Copple, 186 Neb. 696, 185 N. W. 2d 846. This does not mean that a prior judgment in another state determining custody as between the parties will be disregarded. Ordinarily, effect will be given to such a judgment as a matter of comity unless a change in circumstances requires a different result. Copple v. Copple, *supra*. See, also, In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161.

The problem in this case arises out of the finding by the Colorado court that the defendant was guilty of "not just substantial but overwhelming evidence of acts of sexual promiscuity and other acts of misconduct" which were detrimental to the welfare of Jack Lee Loveall, Jr. This finding, made 10 weeks before this action was commenced, together with the entire absence of evidence of unfitness on the part of plaintiff, are controlling circumstances.

The defendant's evidence established that she and her new husband have an adequate home; that Jack Lee Loveall, Jr., is well adjusted in his present environment; that Jack Lee Loveall, Jr., has formed an attachment for his half-brother, Robert; and that he will miss the company and companionship of Robert. We do not consider these facts to be sufficient to overcome the defendant's previous history of misconduct and unfitness. This is particularly true in view of the brief interval between the Colorado decree regarding custody

and the commencement of this action. The record does not show a change in circumstances sufficient to require that the plaintiff be denied custody of Jack Lee Loveall, Jr.

The judgment of the district court is affirmed.

AFFIRMED.

WESLEY F. HANSEN, APPELLEE, V. COUNTY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS.
197 N. W. 2d 651

Filed May 12, 1972. No. 38355.

1. **Statutes: Notice: Taxation.** The provision of section 77-1315, R. R. S. 1943, requiring that notice be given to the record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment," does not apply to increases ordered by the State Board of Equalization and Assessment under section 77-508.01, R. R. S. 1943.
2. **Statutes: Taxation: Administrative Law.** Under the provisions of section 77-1311, R. R. S. 1943, the county assessor has authority to correct valuations which have become erroneous by reason of a judicial declaration of invalidity of an increase ordered by the State Board of Equalization and Assessment.
3. **Actions: Parties: Taxation.** Generally a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed.
4. **Actions: Parties: Judgments.** Ordinarily an action may not be maintained as a class action by a plaintiff on behalf of himself and others unless he has the power as a member of the class to satisfy a judgment on behalf of all members of the class.
5. **Actions: Parties: Judgments: Statutes: Trial: Taxation.** The provisions of section 77-1736.04, R. R. S. 1943, do not contemplate that the court which has entered a judgment declaring the invalidity of a tax will in a class action supervise the tax refund or credit procedures.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed in part, and in part reversed and remanded.

W. R. Mullikin and Richard P. Myers, for appellants.

Jack North and August Ross, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

CLINTON, J.

This case is a class action by a taxpayer to have declared null and void a portion of the tax levied against rural lands in Lincoln County, Nebraska, for the year 1970 and to have the allegedly illegal portion of the tax refunded to the individuals who paid the same. The trial court declared void the portion of the tax as prayed for and retained jurisdiction for the apparent purpose of supervising refunds. We affirm the part of the decree declaring the portion of the tax increase void and reverse the remainder of the decree.

This case is a sequel to County of Sioux v. State Board of Equalization & Assessment, 185 Neb. 741, 178 N. W. 2d 754. The task with which we are now confronted is a distinctly unpleasant one because the problem itself, at first blush, appears to defy both reasonable analysis and reasonable result primarily because it involves a situation for which the statutes made no provision and because it is not clearly evident that any real benefit will accrue to the taxpayers, and the decision which we make clearly adds to the burden of the officials administering the tax laws.

In 1969 the State Board of Equalization and Assessment, acting apparently pursuant to the provisions of L. B. 391, Laws 1969, c. 628, § 1, p. 2528, now section 77-508.01, R. R. S. 1943, ordered after hearing a 50 percent increase, among others, in the valuation of rural lands in Lincoln County, Nebraska. This increase was certified to the county assessor of Lincoln County on August 18, 1969. The county officials acquiesced in the order and prepared their tax valuations for 1969 accordingly, but a taxpayer, Wesley F. Hansen, the plaintiff in the present case, appealed. This court on

July 17, 1970, rendered its decision voiding the increase in valuations on "rural lands."

The problem here arises because before the final decision of this court on July 17, 1970, the county assessor had pursuant to the provisions of section 77-1315, R. R. S. 1943, completed his assessment rolls and certified them to the county clerk, presumably before April 1 as required by the statute just mentioned. Section 77-1315, R. R. S. 1943, requires that: "The county assessor shall before such filing, notify the record owner of every piece of real estate which has been assessed at a higher figure than at the last previous assessment." The statute requires that the notice describe the real estate, state the old and new valuations, and give the date of the convening of the county board of equalization.

The assessor gave no notice to the complaining taxpayer or others similarly situated and in defense of his position asserts that the valuations being used were not an increase over those used for the preceding year as shown by the prior year's assessment rolls as increased by the order of the State Board of Equalization and Assessment, and that there is no requirement in the statutes that notice be given to any taxpayer of any increase in the valuation of any class of property made by the State Board of Equalization and Assessment.

Plaintiff relies upon the provision of section 77-1315, R. R. S. 1943, requiring a notice to the taxpayer where his property "has been assessed at a higher figure than at the last previous assessment." We hold that this provision pertains, obviously it seems to us, only to individual valuation changes made by the assessor. It does not and was not intended to apply to changes in classes of property or percentages which were over a whole taxing district made by the State Board of Equalization and Assessment. Nor do the constitutional requirements of due process make such notice mandatory.

Frye v. Haas, 182 Neb. 73, 152 N. W. 2d 121.

At the time the 1970 assessment was made, the 1969 valuation remained as an increase by the State Board of Equalization and Assessment. At that time both the taxing officials and the taxpayer knew that the 1969 valuation was then under attack in County of Sioux v. State Board of Equalization & Assessment, *supra.* Did the assessor under the circumstances have the duty to anticipate a result adverse to the valuation increase and therefore have a duty to give a provisional notice under section 77-1315, R. R. S. 1943, because a declaration of the invalidity of the 1969 increase would make its use by the assessor in 1970 his increase to which section 77-1315, R. R. S. 1943, would apply? Alternatively, if he had no such duty to anticipate the declaration of the invalidity did he have a duty after July 17, 1970, to restore the 1969 valuations? Even though the notice provisions of section 77-1315, R. R. S. 1943, were not applicable, it nevertheless seems clear that under the provisions of section 77-1311, R. R. S. 1943, the assessor had a duty to make the necessary valuation corrections. Section 77-1311, R. R. S. 1943, in part provides that the county assessor shall "annually revise the real estate assessment for the correction of errors and . . . shall have general supervision over and direction of the assessment of all property." These provisions clearly gave him the authority to make the reduction in valuations after July 17, 1970, when the valuations involved became erroneous because of the decision of this court in the parent case. The evidence establishes that the change could have been accomplished before the levy date. That part of the order of the trial court declaring null and void the part of the 1970 tax attributable to the 50 percent increase of valuation of "rural lands" in Lincoln County ordered by the State Board of Equalization and Assessment for 1969 is correct and is affirmed.

In passing we call attention to the fact that the Leg-

islature in 1971 made provision authorizing the county board of equalization to make percentage increases in classes or subclasses of property after completion of equalization of individual parcels. § 77-1506.02, R. R. S. 1943. The notice provisions under that statute would have been broad enough to cover the situation which arose here had they then been available.

The prayer of the plaintiff's petition, in addition to asking for a declaration of the nullity of the 50 percent valuation increase, asked that "so much of said tax as is the result of the increase in valuation be . . . ordered refunded to the individuals who paid the same, and for such other and further relief as equity may require." The court in its decree not only declared the valuation increase void, but ordered certain unspecified legal subdivisions, presumably school and other districts who were not parties to this action, to levy sufficient taxes to make refunds or give credits, "less the proportionate cost of this proceeding." The court also retained jurisdiction "for the purpose of entering such orders as may be necessary to implement the Decree entered herein."

We hold that all that portion of the court's decree other than the part declaring null and void that part of the 1970 tax attributable to the 50 percent increase in valuation of "rural lands" in Lincoln County ordered by the State Board of Equalization and Assessment for 1969 is erroneous and is vacated.

It has long been the law of this state that a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf. Monteith v. Alpha High School Dist., 125 Neb. 665, 251 N. W. 661; State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N. W. 2d 5. The reason given in these cases is that generally an action cannot be maintained as a class action by a plaintiff on behalf of himself and others

unless he has the power as a member of the class to satisfy a judgment on behalf of all members of the class. This the plaintiff here cannot do insofar as refunds or tax credits are concerned. Further, it would appear that the refund and credit procedures provided by section 77-1736.04, R. R. S. 1943, are exclusive and do not contemplate supervision by the court.

Costs are taxed to the plaintiff.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. LINDBERG CARMAN, APPELLEE.
197 N. W. 2d 643

Filed May 12, 1972. No. 38357.

Public Lands: Improvements: Statutes: Constitutional Law: Landlord and Tenant: Administrative Law. A lessee of common school land possesses a compensable interest in improvements covered by statute and placed by him or his predecessor in interest on the land prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent determination of unconstitutionality of the statute or the absence of permission from the Board of Educational Lands and Funds.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr, Gary L. Loseke, and Kenneth C. Fritzler, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The district court decided that a lessee of common school land possessed a property interest in certain im-

provements placed on the land by his predecessor. The Board of Educational Lands and Funds appeals.

The parties concede the facts as follows: Effective January 1, 1945, Robert Carman obtained a renewal of a lease that he had acquired by assignment in December 1934. The renewal term was 25 years. Lindberg Carman acquired the renewal lease by operation of law upon the death of Robert, his father. At the expiration of the term the board extended the lease to Lindberg on a year-to-year basis.

The improvements in dispute were two houses, a granary, a cattle shed, an open shed, a double corn crib, a well, a cistern, and board and wire fences. The lessee had placed them upon the land after 1934 and prior to 1953 without permission of the board. Lindberg acquired whatever interest Robert possessed.

A lessee of common school land possesses a compensable interest in improvements covered by statute and placed by him or his predecessor in interest on the land prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent determination of unconstitutionality of the statute or the absence of permission from the Board of Educational Lands and Funds. State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769 (1972).

The judgment of the district court was correct.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion in this case. I repeat once more what I have said before. I concede the legislative intent to grant rights to lessees in school land improvements, but question its power or the power of this court to grant an interest of any nature in the land.

This case emphasizes what was pointed out in the dissents in Banks v. State (1966), 181 Neb. 106, 147 N. W. 2d 132. The decision would be construed to give a lessee a property interest in the fee at the expense of the real

owners of the fee, the cestui que trust, the public schools of the state. There can be no question this is now the result.

In Propst v. Board of Educational Lands & Funds (1952), 156 Neb. 226, 55 N. W. 2d 653, this court said: "The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution."

The problem occurs because the majority of the court construed the legislation permitting lessees to recover from their successor lessees for the value of the improvement to give the lessee an interest against the trust itself. This premise I cannot accept, because the Legislature does not have the power to create interests in the trust property for anyone.

In State ex rel. Ebke v. Board of Educational Lands & Funds (1951), 154 Neb. 244, 47 N. W. 2d 520, this court said: "A trustee acts in a representative capacity and persons dealing with him are bound to be cognizant of his powers. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. *The rule is no different in the leasing of property of a trust estate.*" (Italics supplied.) In that same case, this court said: "The state in acting as a trustee is subject to the same standards, and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself."

The majority of the court has consistently ignored this court's holding in Blomquist v. Board of Educational Lands & Funds (1960), 170 Neb. 741, 104 N. W. 2d 264: "As a general rule, improvements of a permanent character, made on real estate and attached thereto without consent of the owner of the fee, by one having no title

or interest, become a part of the realty and vest in the owner of the fee as his own property.

"The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise."

Blomquist involved trees growing on the land, which are not movable improvements. In Blomquist, referring to the statutory provision which attempted to grant a retroactive interest, this court held the Board was without authority to create an interest in the fee.

Article VII, section 1, Constitution of Nebraska, provides: "The general management of all lands set apart for educational purposes shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds." This gives the Legislature the power to direct the general management of the lands, but certainly does not give it the power to authorize the Board of Educational Lands and Funds to permit the acquiring of any interest in the trust property. It is my contention that the State is powerless to gratuitously create liens of any form on public school lands. I contend further that any lessee dealing with the State in its trust capacity is conclusively chargeable with knowledge of the extent of its power.

It seems elementary to me that a strict interpretation must be placed upon all statutes, agreements, and proceedings for the protection of the beneficiaries of our public school lands. This fact has been consistently ignored since Banks v. State, *supra*. I reiterate that I cannot agree with any opinion which grants lessees any lands benefits as against the trust, for the simple reason that the Legislature and this court are without power to create or grant such benefits.

What I said in my dissent in Banks v. State, *supra*,

and in State v. Rosenberger (1972), 187 Neb. 726, 193 N. W. 2d 769, is equally applicable herein.

I am authorized to state that White, C. J., and Newton, J., join in this dissent.

DWIGHT ROBINSON, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.
197 N. W. 2d 396

Filed May 12, 1972. No. 38367.

1. **Contracts: Insurance: Words and Phrases.** The terms and provisions which control in the construction of the coverage afforded by a temporary insurance "binder" are those contained in the ordinary form of policy usually issued by the company at that time upon similar risks.
2. **Contracts: Insurance: Trial: Evidence.** Where the insurer's defense is based upon an exclusionary clause in a policy, the burden is on the insurer to prove facts which bring it within the exclusion.

Appeal from the district court for Lancaster County: WILLIAM F. COLWELL, Judge. Reversed and remanded.

Don A. Fitch, for appellant.

Healey, Healey, Brown & Burchard, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

MCCOWN, J.

This was an action based on an automobile insurance "binder" issued by an agent for the defendant insurance company. At the conclusion of the plaintiff's evidence, the district court sustained a motion to dismiss.

Plaintiff was the owner of a 1967 Ford truck. On May 21, 1969, the plaintiff called at the office of defendant's local agent in Boone, Iowa, and executed an application for insurance on the truck and contents. The plaintiff paid the agent for the first 6 months premium

by check. The agent filled out and delivered to the plaintiff a binder in which the defendant agreed "to bind the named insured subject to the conditions given in the regular policy, for such of the following coverages as are indicated pending the issue of an automobile insurance policy in the form and at the rates and classifications of the Company's manual. This binder shall in no event be in force more than 30 days from date written and shall be superseded by the policy." The plaintiff was the named insured and the binder was dated and effective May 21, 1969. It described plaintiff's truck, and specifically included comprehensive and $100 deductible collision coverage.

On June 9, 1969, the plaintiff's truck was wrecked when it left a county road in Lancaster County, Nebraska, and overturned in an adjacent field. The truck was being driven by another individual with plaintiff's permission. The plaintiff's ownership of the truck and the facts of the accident were admitted in defendant's answer. The answer also alleged that if a policy of insurance existed, it expressly excluded coverage "while owned motor vehicle is rented or leased to others by the insured," and that at the time of the loss the truck was being rented or leased to another. The defendant did not at any time issue an insurance policy but on June 19, 1969, the defendant sent a notice of cancellation to the plaintiff advising him that defendant was unable to continue his "automobile insurance" and that his "policy" was canceled effective June 19, 1969. Plaintiff's check for $72.70 was returned with the notice of cancellation.

Defendant's motion to dismiss was sustained at the close of plaintiff's evidence. No evidence was introduced by either party as to the terms of defendant's "regular policy" nor of any conditions, limitations, or exclusions in such regular policy.

The contentions of the parties on this appeal do not meet. The plaintiff contends that the only contract is

contained in the "binder" and that the nature of the coverages should be that orally requested by the plaintiff. The defendant contends that a "binder" which refers to the conditions given in a regular policy to be issued later is subject to the limitation provisions contained in the regular policy, and then asserts that certain limitations or exclusions which would have been in the policy, if issued, prevent recovery under the facts here. The "binder" is in evidence, but defendant's "regular policy" is not in evidence. The real issue is to determine which party had the burden of going forward with the evidence or producing the "regular policy" at the time the motion to dismiss was sustained.

The terms and provisions which control in the construction of the coverage afforded by a temporary insurance "binder" are those contained in the ordinary form of policy usually issued by the company at that time upon similar risks. 12 Appleman, Insurance Law and Practice, § 7225, p. 323. See, also, Jennings v. Illinois Automobile Club, 319 Ill. App. 587, 49 N. E. 2d 847; Altrocchi v. Hammond, 17 Ill. App. 2d 192, 149 N. E. 2d 646. The problem in cases such as this is whether recovery on the binder is precluded by the policy provisions as to the coverage assumed by the insurer. Generally speaking, courts have concluded that if the insurer would have been liable in an action on the policy, it is liable in an action on the binder or vice versa. See Annotation, Temporary Insurance, 12 A. L. R. 3d 1304.

Here the defendant's pleadings admit that the plaintiff was the named insured, the owner of the insured vehicle, and that the vehicle was damaged when it left the road and overturned. Under these facts, the loss was clearly within the usual coverage of automobile collision insurance policies. The binder here met all the requirements for temporary insurance. The defendant, not the plaintiff, was in possession and control of the form of the "regular policy" to be issued. The

plaintiff established a prima facie case of a loss covered by temporary insurance upon admission into evidence of the binder in view of the admissions of the defendant in the pleadings. The defendant relied upon an exclusion presumed to be contained in the "regular policy." Under the circumstances here, it was incumbent upon the defendant to establish the conditions and limitations of the regular policy which constituted the claimed exclusion. Broadly speaking, the burden of proving an affirmative defense in avoidance of an action on a contract for temporary insurance, like an action on an insurance policy, is upon the insurer. Where the insurer's defense is based upon an exclusionary clause in a policy, the burden is on the insurer to prove facts which bring it within the exclusion. See American Casualty Co. of Reading, Pa. v. Mitchell, 393 F. 2d 452 (8th Cir., 1968).

Here the defendant relied upon an exclusion contained in the terms of its "regular policy" and at the same time contends that the plaintiff was required to introduce in evidence not only the "binder" agreement for temporary insurance, but also the "regular policy." The burden of going forward with the evidence after the establishment of a prima facie case, was on the defendant, not the plaintiff. Under the circumstances here, sustaining the motion to dismiss was erroneous when the "regular policy" was not in evidence.

REVERSED AND REMANDED.

IN RE APPLICATION OF HARRY E. ROBINSON, DOING BUSINESS AS BIG RED MOBILE HOME TRANSPORTER, LINCOLN, NEBRASKA.

HARRY E. ROBINSON, DOING BUSINESS AS BIG RED MOBILE HOME TRANSPORTER, APPELLEE, V. NATIONAL TRAILER CONVOY, INC., ET AL., APPELLANTS.

197 N. W. 2d 633

Filed May 19, 1972. No. 38056.

1. **Public Service Commissions: Carriers: Trial: Statutes.** In granting a certificate of public convenience and necessity the Nebraska State Railway Commission, under section 75-311, R. R. S. 1943, is required to find: First, that an applicant is fit, willing, and able to perform the proposed service; and second, that the service offered is or will be required by the present and future public convenience and necessity.
2. **Public Service Commissions: Appeal and Error.** The matter of the determination of public convenience and necessity is peculiarly within the discretion and expertise of the Nebraska State Railway Commission and its action will not be disturbed by this court in the absence of a showing that such action was illegal or arbitrary, capricious, and unreasonable.
3. ———: ———. If there is evidence to sustain the findings of the Nebraska State Railway Commission, this court may not intervene. It is only where the findings of the commission are against all of the evidence that this court may hold the commission's findings are arbitrary and capricious.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, David R. Parker, Everett C. Pilcher, and Pilcher, Howard & Dustin, for appellants.

James E. Ryan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an appeal from an order of the Nebraska State Railway Commission granting a certificate of public

convenience and necessity for the transportation of mobile homes to the appellee, Harry E. Robinson. The three protestants, National Trailer Convoy, Inc., Morgan Drive Away, Inc., and Mike's Trailer Service, Inc., are licensed common carriers of mobile homes and trailers.

The record shows that Robinson, the appellee herein, has been involved in the transportation of mobile homes and trailers for many years, starting about 1946. At one time he worked for one of the protestants. The record also shows that recently he obtained an interest in a mobile home sales business in Lincoln, Nebraska. Consequently, he has a need to transport mobile homes incident to his business.

Robinson filed his application on December 4, 1969. At the hearing on the application, Robinson produced evidence to prove that he was experienced in the business of transporting mobile homes; that he owned special equipment for such purposes; and that he was financially able to perform the proposed service. The Commission found that the appellee was fit, willing, and able to properly perform the proposed service.

The statute requires: First, that an applicant be fit, willing, and able to properly perform the proposed service; and second, that the service offered is or will be required by the present and future public convenience and necessity. § 75-311, R. R. S. 1943.

The major issue appears to be whether the proposed service offered by Robinson is or will be required by the present and future public convenience and necessity. As we have often said, this determination by the Commission is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the Commission was illegal or arbitrary, capricious, and unreasonable. The striking of the balance between the competing interests of legitimate competition and the

protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Commission. Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756. This authority in the Commission arises from both the Constitution and the delegated authority of the Legislature.

We recently said in Neylon v. Petersen & Petersen, Inc., 181 Neb. 143, 147 N. W. 2d 488, as follows: "The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the finding of the commission is against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious."

We review the evidence briefly to ascertain if there is a rational basis for the Commission's conclusions. Representatives of several mobile home sales businesses in the Lincoln area testified that the demand for transporting mobile homes around the Lincoln area was growing and was expected to continue to grow due to increased sales and revised zoning ordinances. One such witness complained that there was such a "crying need" for transportation services about the Lincoln area that the granting of authority to the appellee would still leave the demand for such services high above the available supply.

Several other witnesses not in the mobile home sales business testified concerning problems they encountered in moving mobile homes to or from the Lincoln area. Several complained of difficulty in even contacting the existing carriers and many who established contact found that it was several days or weeks before an existing carrier could transport their mobile home.

A representative for each of the three appellants in this case appeared at the hearing to protest a granting of authority to the appellee. The thrust of their tes-

timony was that the demand for service was seasonal; that delays during the peak of the season could be expected from time to time; and that if the demand could be anticipated in advance, additional equipment could be scheduled for intrastate transporting of mobile homes in Nebraska.

Based upon this evidence, the Commission concluded that the public convenience and necessity required the appellee's application for authority be granted in part and denied in part. While the appellee requested and was granted authority to make shipments both originating and terminating at points within the state other than the Lincoln area, the Commission limited the grant to a terminal site in the Lincoln metropolitan area only.

It is apparent, even from this brief review, that there was conflicting testimony on this basic issue. The Commission is charged with the responsibility of supervising common carriers in the areas involved and may draw upon its general knowledge and familiarity in determining the needs and requirements of transporting mobile homes. It could reasonably have found, under the evidence, that there was a public need for transportation services in the Lincoln area and restricted the grant to a terminal site in the Lincoln metropolitan area only. There is evidence in this record which would support the conclusion that even after the granting of the authority to Robinson, the demand for such transportation services would be above the available supply. It could reasonably have found that there was a peculiar problem connected with the peak or seasonal loads in the mobile home sales business in the Lincoln area. That being true, it is not for this court, sitting as a court of review, to disturb its judgment that the grant herein was in the public interest. Neylon v. Petersen & Petersen, Inc., *supra*.

Turning to the issue of fitness the protesting appellants point to the following as evidence as to a lack of fitness: The appellee's lengthy association with the ap-

pellant Morgan Drive Away, Inc., was terminated after the appellee was involved in an accident while moving a mobile home; the appellee submitted an allegedly incomplete and inaccurate financial statement to the Commission; the appellee transported mobile homes for the mobile home sales business in which he has an interest and, according to the appellants, such uncertified carriage was a violation of section 75-309, R. R. S. 1943; and the obligation to move his own business property conflicts with the appellee's common carrier obligations.

We observe that these claims on the part of the appellants are either denied or explained by Robinson and the weight to be given to them is clearly a matter of judgment to be exercised by the Commission. In substance, the Commission rejected the contention that Robinson could not be properly supervised and would not be responsive to legal orders and regulations of the Commission. On the other hand, the record clearly shows that Robinson has sufficient experience, equipment, and finances to justify the Commission's conclusion that he could willingly and ably perform the proposed service.

Under these circumstances we think it inappropriate for this court, sitting in review, to balance or weigh the credibility of the detailed evidence. As we have stated before, it is within the authority of the Commission exercising its judicial powers to weigh this evidence along with all of the other evidence in the record and reach a determination as to fitness. Our function in review is only to determine whether it has a rational basis and is not arbitrary, capricious, or unreasonable. Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*. On the record as a whole we hold that the Commission's determination was within its authority, reasonable, and not arbitrary or capricious.

We, therefore, hold that the order of the Nebraska State Railway Commission granting limited authority

to the appellee, Harry E. Robinson, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY PAUL KENNEDY, APPELLANT.

197 N. W. 2d 633

Filed May 19, 1972. No. 38235.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Gary Paul Kennedy, pro se.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant appeals from his conviction on a guilty plea to the charge of larceny from the person. The only issue on appeal is the excessiveness of the sentence. Defendant was sentenced to 2 to 4 years in the Nebraska Penal and Correctional Complex.

Defendant's counsel had made a plea for probation because of defendant's age. The trial court reminded defendant that he had been charged eight times with felony violations, and had spent time in the Boys' Training School where, because he was so troublesome, he was transferred to the Penal Complex for safekeeping.

Under the circumstances, defendant received a minimal sentence and there was no abuse of discretion.

Judgment affirmed. See Rule 20.

AFFIRMED.

WALTER PETERS, APPELLEE, V. HARVEY LANGREHR ET AL., APPELLANTS.
197 N. W. 2d 698

Filed May 19, 1972. No. 38280.

1. **Waters: Statutes.** Waters which may be discharged into a natural depression, or draw, or watercourse without liability under the provisions of section 31-201, R. R. S. 1943, do not include waste irrigation waters in quantities which are injurious to neighboring land.
2. **Injunction.** Injunctive relief is a discretionary remedy dependent upon the circumstances of the case.
3. **Waters: Easements: Time.** An easement for the discharge of waste irrigation waters into a natural depression, draw, or watercourse flowing through the land of another cannot be acquired until it has been freely exercised without material change under a claim of right for the full period of 10 years.

Appeal from the district court for Howard County: WILLIAM F. MANASIL, Judge. Reversed and remanded with directions.

William G. Blackburn of Cunningham & Blackburn, for appellants.

Arthur C. Mayer of Mayer & Mayer, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and COLWELL, District Judge.

CLINTON, J.

This is an action to permanently enjoin the defendants from discharging upon the land of the plaintiff waste irrigation waters. Defendants denied generally, but they also pled the statute of limitations, section 25-202, R. R. S. 1943, apparently claiming a prescriptive right to make the discharge, and also pled laches. After trial the court entered an order in which the defendants were "permanently enjoined from permitting excess irrigation water from defendants' irrigation system from running upon any portion of the plaintiff's premises." We modify the decree and remand the cause to the district court with directions.

The principal issues for decision on this appeal are: (1) The extent of the right, if any, of a landowner to discharge waste irrigation water into a drainway on his own land and through the drainway to neighboring land; and (2) whether the evidence justified relief by injunction.

We, of course, consider the matter de novo here. In so doing, however, where the evidence is in irreconcilable conflict we consider the fact that the trial court saw and heard the witnesses and must have accepted one version of the facts rather than the other. Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467.

The defendants are the owners of the east half of the northwest quarter, and the southwest quarter of the northwest quarter of Section 26, Township 13 North, Range 9 West of the 6th P. M., in Howard County, Nebraska. The plaintiff owns most of the rest of Section 26 and his land abuts the entire boundary of the defendants' land on the south and east. Part of the southeast quarter of Section 26, owned by the plaintiff, is pastureland and it is the alleged ponding of waste irrigation waters at the outlet of a drain in this pastureland which gives rise to this litigation. The drain, ditch, or natural depression in the state of nature begins in the northwest quarter of Section 27, west of the defendants' tract, meanders easterly and southerly over the defendants' land, and enters the plaintiff's land on the northern boundary of the southwest quarter of Section 26. At that point, by reason of the improvements and changes made by the plaintiff, it flows straight south for a distance, then turns at a right angle to the east, passes through two culverts in the farmstead road, and empties into the pasture in question. Before the changes were made by the plaintiff 8 or 9 years before trial, the last portion of the drain, instead of turning at a right angle and going straight east, meandered southeasterly, passed under the farmstead road at a point further south through another culvert, and

joined a meandering continuation of the drain which then ran northeasterly across the plaintiff's pasture where it joined a larger drain on adjacent land to the east.

We find that the drainway or depression in its natural state does not qualify as a watercourse as defined in section 31-202, R. R. S. 1943, but does qualify as a natural depression or draw under the provisions of section 31-201, R. R. S. 1943, and it appears that it does ultimately pass into a watercourse known as Prairie Creek and thence into the Platte River. It is such a natural depression or draw as would entitle the defendants to have surface waters empty from their land. See, Bussell v. McClellan, 155 Neb. 875, 880, 54 N. W. 2d 81; Town of Everett v. Teigeler, *supra*, at p. 776. One of the questions which we must answer here is whether the discharge of excess irrigation water into the drainway comes within the right when the water discharges on the plaintiff's land and ponds there.

The evidence justifies the following findings: The defendants drilled their first irrigation well in 1949 and used it until 1955 when they replaced it with another. During that period there was some discharge of waste irrigation water by defendants into the drain and onto the plaintiff's land, but there is nothing to justify any finding as to the quantity passing onto the plaintiff's land, or the frequency, or the effect thereof. It does appear, however, that such discharge would be into the draw in its natural state rather than ending in the pasture where it now does by reason of the change in direction of the drain made by the plaintiff 8 or 9 years before trial. In 1955 the defendants drilled and began to use a third irrigation well. Excess irrigation waters, from what are designated in the record as fields 2, 3, and 4, all run into the drainway on the defendants' land. The defendant Harvey Langrehr testified that this occurred every year from 1955 on and that the excess water went onto the plaintiff's land, but

again there is nothing to justify any finding as to the frequency, quantity, or effect. In 1968 the defendant made some changes in his fields and in his irrigation methods. He straightened the natural drain where it passes through field 2 and placed the drain along the north edge of the field. He leveled a portion of this field, including the former site of the drainway, and began thereafter to irrigate by gravity irrigation the portion of field 2 which he had formerly watered by a sprinkler system. The evidence justifies a finding that these changes increased the quantity of waste irrigation water discharged into the drain.

The evidence justifies the finding that in the years 1969 and 1970 excess irrigation waters from fields 2, 3, and 4 passed into the drainway and onto the plaintiff's pastureland in quantities greater than ever before, resulting in the ponding of waters in the pastureland to the extent of an area of about 2 acres and up to a foot in depth; because his cattle stood in this water they developed a foot disease; and therefore he removed the cattle from the pasture for about 6 weeks in each of the years 1969 and 1970. It appears from the evidence that the plaintiff in these years asked the defendant to so irrigate as to prevent excessive flow of waters onto the plaintiff's land but the defendant indicated he would make no changes.

The defendant testified he could prevent the passage of all waste irrigation water from the plaintiff's land through the drainway by erecting two concrete catch basins 100 feet wide, 200 feet long, and 5 feet deep, and by the use of a pump and pipeline he could reuse this water on his own fields. He estimated the cost of such method at about $3,000. He further testified the plaintiff could cure the ponding of water on the pastureland at a cost of about $200 by cutting channels from the ponds to the natural drains which go on to the east. There is nothing in the record from which a determination can be made as to what the effect, if any,

on plaintiff's land would be if the waste water passed onto the plaintiff's land through the former natural drain into the pasture at the point further south where it would have gone before the changes made by plaintiff, except that it does appear it would in all probability have made unusable at times a portion of one cultivated field through which the drain in its natural state passed before the plaintiff made the right-angle turn in this drainway. We consider this change, for reasons which appear hereafter, irrelevant to the decision in the case.

In the recent case of Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73, this court approached the question here presented to us but did not directly answer then because in that case the evidence did not show that the excess irrigation water which might in the future be cast upon the plaintiff's lands would be in other than negligible amounts and because the defendant agreed that if for any reason water was accumulated and cast upon the plaintiff's lands he would install a works and pump and reuse the water for irrigation purposes. The court in that case denied injunctive relief conditioned upon the defendant fulfilling his promise, if necessary, to construct a ditch and terrace to catch the waste water and install a pump to reuse it. It then authorized the lower court to make findings that the fulfillment of the promise was a condition upon which the defense to injunctive relief was founded. That case at least impliedly held that waste irrigation waters are not surface waters such as are contemplated to come within the protection afforded by section 31-201, R. R. S. 1943. Neither the common law nor civil law rules applicable to drainage apply to water artifically applied to the land. F. Trelease, Water Law, p. 95 (1967); Vantex Land & Development Co. v. Schnepf, 82 Ariz. 54, 308 P. 2d 254. See, also, § 46-635, R. R. S. 1943, defining ground water. An examination of the cases considered by this court in connection with the above-mentioned section 31-201, R. R. S. 1943, leads

us to believe that statute was not intended to include the discharge of waste irrigation waters in injurious quantities. Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195; Nickerson Township v. Adams, 185 Neb. 31, 173 N. W. 2d 387; Town of Everett v. Teigeler, *supra;* Muff v. Mahloch Farms Co., Inc., *supra.* We hold that the defendants have a right to discharge into the drainway only surface waters and only such waste irrigation waters as can be discharged and borne away without injury to the plaintiff's land. Provident Irr. Dist. v. Cecil, 126 Cal. App. 2d 13, 271 P. 2d 157. There is evidence in the record that in addition to surface waters which pass into the drainway some water from a spring in the draw on the defendants' land contributes to the flow. The quantity is not shown. The evidence also shows that some irrigation water from land further west enters the draw. None of these, however, appears to us to be a contributing factor to the incidents which give rise to plaintiff's claim.

We point out that the injunctive relief in cases of this kind is discretionary with the court and dependent upon the circumstances, nature, and extent of the threatened damage, and the probability of its continuance. Prosser, Law of Torts (4th Ed.), § 90, p. 602. Here we believe the trial court was justified in granting some relief to prevent the discharge of irrigation waters into the drainways in injurious quantities and which practice if continued could ripen into a prescriptive right. The defendants in this case have failed to prove a prescriptive right to discharge waste irrigation waters onto the plaintiff's land because they have failed to show the extent without material change of such alleged adverse user for the prescriptive period of 10 years. Hagadone v. Dawson County Irr. Dist., 136 Neb. 258, 285 N. W. 600; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.

As already indicated, we think the scope of the injunction granted is too broad. It prohibits absolutely

the discharge of waste irrigation waters onto the plaintiff's land at any time, in any quantity whether injurious or not, and at any point. It is not just limited to the waters which pass into the drainway and then onto the plaintiff's land in injurious quantities. The evidence shows that at one time in 1969 irrigation waters from field 1, which we have not heretofore mentioned and which does not empty into the drainway, broke through a dike and passed onto the plaintiff's field to the east. The defendants at that time at the plaintiff's request built a better dike. There is no threat of continuance. Injunctive relief is not justified as to this possible threat of damage.

We recognize the possibility that implementation of justified relief may depend upon any proposals the defendants may have to prevent the continued recurrence of the damage. See, Nickerson Township v. Adams, *supra;* Muff v. Mahloch Farms Co., Inc., *supra.*

We reverse the judgment and remand the cause to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM JOHNSON, APPELLANT.
197 N. W. 2d 638

Filed May 19, 1972. No. 38296.

Criminal Law: Sentences: Appeal and Error. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Frank B. Morrison, Sr., and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an appeal from an alleged excessive sentence. The judgment and sentence are affirmed.

Defendant was convicted of receiving stolen property valued in excess of $100. A stolen automobile was stripped in a garage owned by defendant's father. Defendant made arrangements for the use of the garage in exchange for parts of the automobile. His father did not appear to be implicated. Defendant was also charged with being an accessory to the theft but the record fails to disclose how this charge was disposed of. Presumably it was dropped on entry of a plea of guilty to the charge of receiving stolen property. Defendant was placed on probation and 3 days later was again arrested on charges of being an accessory to breaking and entering an automobile and carrying a concealed weapon. The order of probation was set aside and defendant sentenced to not less than 5 nor more than 7 years in the Nebraska Penal and Correctional Complex.

It appears that this was the first felony conviction of defendant. As a result, the court dealt lightly with him and ordered probation. His immediate violation of the order by the commission of two more offenses conclusively demonstrated a fixed criminal tendency and contempt for the leniency shown him. The sentence was within statutory limits and there has not been an abuse of discretion.

Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion. See State v. Gamron, 186 Neb. 249, 182 N. W. 2d 425.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY RICKY BRIONEZ, APPELLANT.

197 N. W. 2d 639

Filed May 19, 1972. No. 38334.

1. **Criminal Law: Rape.** Previous chastity is an essential element of the offense of statutory rape of a female child under age 18 but over age 15.
2. **Criminal Law: Rape: Words and Phrases.** A woman who is chaste is one who has never had unlawful sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Charles F. Fitzke and James T. Hansen, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Randall E. Sims, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SMITH, J.

A jury found Henry Brionez guilty of statutory rape, and the court imposed a sentence of 5 years. Brionez appeals. He assigns for error insufficiency of the evidence.

A jury might properly find as follows. The victim, age 17 and a college student, visited Scottsbluff, intending to spend the night with Hopie, a girl friend. During her visit she met a close friend, Mike, and two of his companions, Raymond and Gabby, ages 17. At Mike's home the group played music, danced, and drank the contents of 23 cans of Budweiser beer which Mike's

mother had purchased. The victim, who had drunk beer only on two previous occasions, consumed the contents of 4 cans over a period of 3 hours. As the group prepared to depart, Brionez, age 19 and a stranger to the victim, entered in company with Mike's brother.

The group without Brionez departed in a four-door Ford Falcon automobile ostensibly to transport the victim to Hopie's home. The automobile proceeded to the sugar mill, where Brionez entered it, Brionez having traveled there in his own automobile. It then proceeded to a cornfield 1 ½ miles from Scottsbluff. En route Mike kissed and embraced the victim but went no farther. At the cornfield Mike requested sexual intercourse, but the victim, who was chaste, refused. Mike said, "It's either me or all of us." She was adamant. Mike continued, "All right, guys," and the other three crawled over the seat into the back seat. They pawed under her clothing. Mike reiterated his threat. The frightened victim was crying, screaming, and struggling. Mike said, "If you don't shut up, we're going to . . .," finishing the sentence with slang that the victim did not understand. Her inquiry brought this answer: "Well, if you don't be quiet, you're going to find out." Relying on Mike's promise to keep the others away, she submitted to him, helping slightly in her disrobement.

After sexual intercourse with Mike the victim was held down. Each of the others engaged in sexual intercourse with her. Brionez was the fourth one to do so. Some repeated the process under the same conditions. The victim was then transported to Hopie's home.

Damage to the clothing of the victim was negligible. A physician who examined her found redness and swelling of the labia and surrounding area of the vulva but no other evidence of physical harm.

The evidence is said to be insufficient in that the previous chastity of the victim was lost by the act of sexual intercourse with Mike. Previous chastity is an

essential element of statutory rape. See § 28-408, R. S. Supp., 1969. A woman who is chaste is one who has never had unlawful sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity. See, State v. Vicars, 186 Neb. 311, 183 N. W. 2d 241 (1971); Marchand v. State, 113 Neb. 87, 201 N. W. 890 (1925); 1 Anderson, Wharton's Criminal Law and Procedure, § 318, p. 659 (1957). The evidence of previous chastity in the present case was sufficient.

Other assignments of error relate to instructions and excessiveness of the sentence. On the latter assignment we have examined the presentence report. A summary of its contents would serve no useful purpose. The assignments of error are without merit.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILL MULLEN, APPELLANT.
197 N. W. 2d 651

Filed May 19, 1972. No. 38344.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Bill Mullen, pro se.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN L. ANDERSON, APPELLANT.

197 N. W. 2d 697

Filed May 19, 1972. No. 38346.

1. **Statutes: Constitutional Law.** Ordinarily, if an amendatory act is invalid, the original statute remains in effect.
2. **Statutes: Criminal Law: Sentences.** Where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeal from the district court for Kearney County: FRED R. IRONS, Judge. Affirmed in part, and in part reversed and remanded.

Steven L. Anderson, pro se.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant pled guilty to three counts of possession of drugs on December 8, 1970. Count I involved possession of narcotics, as defined in section 28-451(14), R. S. Supp., 1969; Count II, possession of marijuana and hashish; and Count III, possession of a depressant or stimulant drug. Defendant was fined $750 and sentenced to 2 to 3 years in the Nebraska Penal and Correctional Complex on Count I; sentenced to 7 days in the county jail on Count II; and fined $750 and sentenced to 2 to 3 years in the Nebraska Penal and Correctional Complex on Count III.

Defendant's assignments of error are as follows: (1) The unconstitutionality of sections 28-451, 28-487, 28-489, and 28-499, R. S. Supp., 1969; and (2) the excessiveness of the sentences.

Defendant's first assignment of error was adequately

answered in State v. Greenburg (1971), 187 Neb. 149, 187 N. W. 2d 751. In that case, we held: "Ordinarily if an amendatory act is invalid, the original statute remains in effect."

There is merit to the defendant's second assignment of error, in that he was sentenced under sections 28-470 and 28-472.04, R. S. Supp., 1969, as they existed at the time the offense was committed. These sections were repealed by Laws 1971, LB 326, § 31, R. S. Supp., 1971, which became effective May 26, 1971.

The defendant withdrew his not guilty plea and pled guilty to the offenses on September 21, 1971, and the hearing was continued until October 4, 1971, for a presentence report. It is evident from the record the defendant entered into a plea bargain on the assumption that if probation was not granted he would be sentenced under section 28-4,125, R. S. Supp., 1971. LB 326 repealed the provisions under which the defendant was sentenced. This case is controlled by State v. Roberts (1972), *ante* p. 209, 196 N. W. 2d 118, in which we held: "Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise."

Where the record does not clearly indicate what sentence would have been given if the trial judge had proceeded under the amendatory act, the case should be returned to him for resentencing. The sentences rendered herein as to Counts I and III are set aside, and the case is remanded to the district court for resentencing on those counts, in accordance with this opinion. The sentence on Count II is affirmed.

Judgment affirmed as to Count II, and remanded for resentencing on Counts I and III.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH DUANE ARP, APPELLANT.

197 N. W. 2d 703

Filed May 19, 1972. No. 38362.

Criminal Law: Sentences: Appeal and Error. A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Howard County: WILLIAM F. MANASIL, Judge. Affirmed.

Shaughnessy, Shaughnessy & Shaughnessy, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

WHITE, C. J.

The sole question involved in this case is the contention that the sentence was excessive. The defendant was sentenced on two counts of burglary under section 28-532, R. R. S. 1943, which provides for a penalty of not less than 1 year nor more than 10 years. On one count he received an indeterminate sentence of 3 to 5 years, and on the other count a concurrent sentence of 1 to 3 years. We observe the defendant in this case does not contend that he is entitled to probation; nor at any time does he discuss any particular facts or circumstances surrounding the commission of the offense or his personal record. His sole contention seems to be that the court did not properly consider certain philosophical considerations which are currently popular in the field of criminal jurisprudence.

There is nothing in the record to show that the sentence and the imprisonment of the defendant was not a legitimate exercise of the district court's judicial discretion to consider "the nature and circumstances of

the crime and the history, character and condition of the offender." § 29-2260(2), Laws 1971, L.B. 680, § 15.

The sentence is well within the limits provided by the statute and is concurrent, and there is nothing of any nature whatsoever to show an abuse of discretion on the part of the district court. A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion. State v. Middleton, 187 Neb. 821, 194 N. W. 2d 568.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARVEY RUFAS HOWARD, APPELLANT.
197 N. W. 2d 641

Filed May 19, 1972. No. 38379.

1. **Criminal Law: Searches and Seizures: Affidavits.** An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay.
2. ———: ———: ———. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the Aguilar test.

Appeal from the district court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

Leo M. Bayer, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The sole issue in this case is whether a search warrant was issued without sufficient showing of probable cause. The defendant was found guilty of possessing

LSD and argues here that the district court committed reversible error in denying defendant's motion to suppress evidence seized under the search warrant in question. We affirm the judgment of the district court.

The information brought to the attention of the magistrate who issued the search warrant was contained in an affidavit sworn to by the county attorney of Dawes County, Nebraska. The affiant stated: "* * * that an informant of known reliability whose information has been dependable in the past, and who has co-operated with this affiant in the past, and who has co-operated with the Chadron City Police in the past has advised that one Harvey Howard has in his possession on his person or in his luggage or personal effects that he carries with him when travelling certain narcotic capsules or narcotic substances believed to be mescaline; that the informant states that he observed the said Harvey Howard while in said Harvey Howard's room at Kent Hall on the Chadron State College Campus emptying capsules of gelatin; that said Harvey Howard informed him that the capsules were going to be filled with mescaline; that he, the said Harvey Howard, was going to try to make 300 capsules of mescaline; that he, the said Harvey Howard, was cutting the mescaline with chocolate milk; that the capsules were to be sold for $2.00 or $2.50 apiece but that if less than 300 of them were made, they would have to sell them for a higher price; that further, said Harvey Howard told said informant that he was taking some of the mescaline capsules home with him the first time he went home; that said informant knows that said Harvey Howard has not gone home since the 31st of January, 1971, the date upon which the above stated conversation and observations took place; that said informant knows that said Harvey Howard is going home the afternoon of February 5, 1971; the (sic) he will be a passenger in a 1969 Green Chevrolet Nova automobile with license No. Nebraska 65-C594; and that said informer was told by

said Harvey Howard that said Harvey Howard had purchased one quarter ounce of mescaline for $100.00 that was being used to make the capsules * * *."

We observe that an affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723; Coyne v. Watson, 282 F. Supp. 235 (D. C., Ohio). It is also well established that affidavits for search warrants are to be construed in a common-sense manner. State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21.

In substance, the defendant contends that the affidavit for the search warrant is insufficient to demonstrate probable cause; this because the affidavit is based on hearsay and because the informant was not identified and is not corroborated. Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723.

We reject this contention. We observe that in this case we not only have an eyewitness informant, but an informant the affiant, the county attorney, knew personally. It seems clear to us that the reliability of the informant is established by a simple reading of the affidavit, and further that the affidavit recites sufficient details and circumstances to justify the underlying belief that narcotics would be found in the defendant's possession.

On the matter of corroboration, we observe that we have an eyewitness informant. In the case of an informant who speaks from personal observation by way of sight or hearing, the courts generally have held that such firsthand knowledge is self-corroborating and tends to fulfill both aspects of the Aguilar test contended for by the defendant.

In McCreary v. Sigler, 406 F. 2d 1264, the court affirmed the United States District Court for Nebraska in a conviction for theft of a telephone booth coin box.

A search warrant had been obtained on the basis of an affidavit reciting information obtained from an unidentified individual who had personally observed the defendants in the telephone booth and overheard the sound of coins in a box. In concluding that the account of an eyewitness informant need not be otherwise corroborated, the Eighth Circuit Court of Appeals said: "However, reliability of an informant may be demonstrated to the magistrate in many collateral ways. Cf. United States v. Bozza, 365 F. 2d 206, 225 (2 Cir. 1966). Petitioner urges error because the informant was not identified in any way. Yet mere identification by name does not establish reliability of the person. Even if the informant's occupation were given, this would not by itself lend 'credibility' to what he says. In some instances where it is alleged that the informant was known to the affiant or had passed on previous information, this has been held to be a sufficient test of the reliability of the informant. Rugendorf v. United States, 376 U. S. 528, 84 S. Ct. 825, 11 L. Ed. 2d 887 (1964); Jones v. United States, 362 U. S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). However, where the affiant officer does not know the informant it would be impossible for the affiant to vouch as to the informer's reliability.

"Under such circumstances reliability of an informant may best be established by the affiant relating some corroboration of the story which the informant tells. Furthermore, the underlying circumstance even without corroboration may have built-in credibility guides to the informant's reliability. *The essence of reliability may be found in an informant's statement of facts rather than an allegation of mere conclusory suspicion. An informant who alleges he is an 'eyewitness' to an actual crime perpetrated demonstrates sufficient 'reliability' of the person.* In direct accord, see e. g., Coyne v. Watson, 282 F. Supp. 235 (S. D. Ohio 1967), aff'd 392 F. 2d 585 (6 Cir. 1968). These facts provide a

similar standard in determining probable cause for arrest without a warrant. Probable cause for an arrest may exist where an unknown citizen makes complaints, as a victim or eyewitness to a crime, where the underlying circumstances demonstrate his firsthand personal knowledge." (Emphasis supplied.)

The contention of the defendant is without merit, and the judgment and sentence of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICCARDO L. SILVACARVALHO, APPELLANT.
197 N. W. 2d 637

Filed May 19, 1972. No. 38400.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Riccardo L. Silvacarvalho, pro se.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

In this appeal defendant maintains a sentence of 2 years for burglary is excessive. He had several prior felony convictions and was subject to a habitual criminal charge. See State v. Holoubek, 187 Neb. 163, 188 N. W. 2d 439.

The judgment of the district court is affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES RANSOM, APPELLANT.

197 N. W. 2d 637

Filed May 19, 1972. No. 38425.

Criminal Law: Post Conviction. Where the files and records show that the defendant is not entitled to post conviction relief the motion is properly denied.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Charles Ransom, pro se.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

In his motion for post conviction relief the defendant alleged he had been sentenced to imprisonment on a count charging he was a habitual criminal and that the sentence was void under Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403. See, also, State v. Tyndall, 187 Neb. 48, 187 N. W. 2d 298.

The record shows clearly that the defendant was sentenced on separate counts of burglary. The motion was properly denied. State v. Gero, 186 Neb. 379, 183 N. W. 2d 274.

The judgment is affirmed.

AFFIRMED.

DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, AS RECEIVER AND LIQUIDATING AGENT OF NEBRASKA STATE BANK OF VALENTINE, VALENTINE, NEBRASKA, INSOLVENT, APPELLEE AND CROSS-APPELLANT, V. FRANK L. COLBURN, APPELLANT AND CROSS-APPELLEE.

198 N. W. 2d 69

Filed May 26, 1972. No. 38116.

1. **Motions, Rules, and Orders: Verdicts: Evidence: Trial.** In determining whether a motion for judgment notwithstanding the verdict should have been sustained, the evidence must be considered in the light most favorable to the party who obtained the verdict. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.
2. **Verdicts: Appeal and Error: Evidence.** The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.
3. **Banks and Banking: Corporate Officials.** A director of a bank must exercise ordinary care and prudence in the administration of the affairs of the bank. He must exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances and give the same degree of care and prudence as is generally exercised by men in their own affairs.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Michael V. Smith and W. Gerald O'Kief, for appellant.

Milton C. Murphy of Murphy, Pederson & Piccolo, and Bernard C. Smith of Smith Brothers, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and CLINTON, JJ.

BOSLAUGH, J.

The Nebraska State Bank of Valentine, Nebraska, was closed on October 29, 1964, by the Department of Banking of the State of Nebraska. The bank had become insolvent because its president, Richard L. Davenport,

had embezzled over $3,000,000 of its funds.

The defendant, Frank L. Colburn, was a director and the cashier of the bank at the time it was closed. This action was commenced on June 8, 1966, by the Department of Banking, as receiver and liquidating agent, to recover from Colburn the loss sustained by the bank because of his failure to discover and detect the misappropriation of bank funds by Davenport. Essentially, the action was one to recover damages caused by the negligence of the defendant.

The jury returned a verdict for the defendant. The trial court sustained a motion for judgment notwithstanding the verdict and ordered a new trial on the issue of damages only. The trial court determined, as a matter of law, the defendant was liable for the loss caused by his negligence between June 8, 1962, and October 29, 1964, but that the amount of the loss was a question for the jury. The defendant has appealed. By cross-appeal the plaintiff contends that the trial court should have determined the damages as a matter of law.

The defendant was first employed by the bank in 1924 as a teller and posting machine operator. The bank was then controlled by E. C. Davenport and J. W. Tobien. In 1930, the defendant became the cashier of the bank. In 1948, Richard L. Davenport succeeded his father, E. C. Davenport, as president of the bank. After the death of E. C. Davenport, the control of the bank passed to Richard L. Davenport and his mother, M. M. Davenport. At the time the bank closed they, together with Davenport's wife, owned approximately 55 percent of the stock.

Richard L. Davenport testified, by deposition, that sometime after 1948 he commenced the misappropriation of bank funds. By 1950 or 1951 the bank had become insolvent. His method of operation involved the use of notes and property statements that had been signed in blank by customers of the bank. He would

fill out the notes and property statements and then insert the notes into the flow of daily transactions of the bank or send them directly to a correspondent bank. An account might be opened to receive the proceeds from the spurious note. The proceeds from the notes would be transferred by use of debit memorandums. When monthly statements were made he would hold the statements or have them remade so that the accounts would appear to have proper balances.

The embezzlement was difficult to discover because the transactions appeared to be regular on their face. The signatures were genuine and the property statements seemed to justify the loans. The bank did a large volume of business and occasionally had a million-dollar day. On a typical day there would be 3,000 or more bookkeeping entries of which only 4 or 5 might relate to spurious transactions. Notes that were placed directly with correspondent banks would appear only in the total remittances for the day. The matter was further complicated in that some of the notes were valid in part.

Colburn had his desk near the front door of the bank and devoted a large part of his time to an insurance business that he had operated since 1930 and as a partnership with Davenport. His other duties included supervision of the bookkeeping department and the cash in the bank. The loans were handled by Davenport although Colburn occasionally handled small transactions. Davenport opened all the mail and kept many of the records in his office in a locked file.

Although Colburn had been the cashier of the bank for nearly 35 years, he was not familiar with statutes or directives of the Department of Banking concerning the duties of the officers of a bank. His understanding was based upon his experience in the bank and his association with the Davenports. He had complete confidence in Richard L. Davenport, as did the other officers, employees, and customers of the bank.

The bank was examined regularly by the Department of Banking and the Federal Deposit Insurance Corporation. None of these examinations indicated any irregularity other than a very high volume of loans, both in-bank loans and loans placed or sold to correspondent banks. This condition also caused concern to the defendant. On May 19, 1964, the defendant called the Deputy Director of Banking and said he was concerned about the note case of the bank; the volume of loans; the size of some of the loans; and the territory in which the loans were being made. The defendant requested a special examination of the bank.

A joint examination conducted by the Department of Banking and the FDIC commenced on October 13, 1964. During this examination the examiners were instructed to check the proceeds from notes and verify a part of the accounts. The examination failed to disclose any irregularity and on October 22, 1964, the examiners were ready to leave the bank.

During the second week of the examination the defendant happened to see some of the working papers used by the examiners and noticed that all or most of the correspondent banks appeared to hold notes with the Tobien name on them. The defendant obtained copies of the working papers from the examiners and made an analysis of the loans listed on them.

The next day, or the day after that, the defendant happened to have a conversation with Paul Charbonneau, a customer who was supposedly indebted to the bank in the amount of $90,000. During their conversation the defendant learned that Charbonneau had no cattle and that the cattle on his land belonged to another man. The defendant then asked the examiners to check the Charbonneau and J. W. Tobien notes.

As the examiners were leaving the bank on October 22, 1964, they talked with the defendant and advised him concerning two large notes and five small notes that were to be reduced or charged off. They also ad-

vised the defendant that they had checked the Charbonneau and Tobien lines and that they were "O.K." The defendant asked the examiners to check some of the other notes which he thought were too high or were signed by debtors that he did not know. During the conversation, the defendant called J. W. Tobien and made an appointment for the examiners to see Tobien that evening.

That evening the Tobiens told the examiners they were not indebted to the bank. On the following day the Director of Banking, his counsel, and the examiners confronted Davenport with this information. The Tobiens were called into the bank and they each admitted they were indebted on the notes in question.

The following week the examiners returned to the bank and did more checking with respect to proceeds from notes. They uncovered what appeared to be a serious irregularity in the St. Francis Educational Society account. Although the society had suffered no loss, it was apparent there had been irregularities in the transactions. After interviewing other debtors they eventually obtained a statement from L. C. Beel, Sr., that he was not indebted to the bank. The Department of Banking then closed the bank.

The plaintiff's right to recover in this case depended upon proof of negligence. The burden of proof was upon the plaintiff to show that the defendant had been negligent in failing to detect or discover the misappropriation of bank funds by Davenport and that the negligence of the defendant was the proximate cause of the loss. There was no evidence to sustain the allegations that the defendant had participated in the embezzlement and misappropriation of bank funds by Davenport.

A director of a bank must exercise ordinary care and prudence in the administration of the affairs of the bank. He must exercise that degree of care which ordinarily prudent and diligent men would exercise un-

der similar circumstances. Briggs v. Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. Ed. 662. He is required to give the same degree of care and prudence as is generally exercised by men in their own affairs. Ashby v. Peters, 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843. See, also, Annotation, 25 A. L. R. 3d 941.

In determining whether a motion for judgment notwithstanding the verdict should have been sustained, the evidence must be considered in the light most favorable to the party who obtained the verdict. Haffke v. Grinnell, *ante* p. 323, 196 N. W. 2d 390. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.

Much of the evidence bearing upon the issue of negligence was circumstantial. The direct evidence was largely in conflict. The issue of liability was a question of fact which, ordinarily, is a question for the jury.

The trial court correctly determined that the action was one at law. There was no serious controversy concerning the loss sustained by the bank. The principal issues were negligence and proximate cause.

In addition to the evidence which has been summarized, the following matters were of significance in this case. The defendant owned only about 4 percent of the stock. The Deputy Director of Banking testified that Davenport dominated the affairs of the bank and that Colburn "was never in a position to get anything done." He characterized the defendant as "not much more than a figurehead cashier."

Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, cited by the plaintiff, was an action in deceit based upon the publication of false statements as to the financial condition of a bank. In that case the falsity of the statements could have been discovered easily by a comparison of each report with the daily balance sheet of the

bank for the same date. In this case the evidence shows that the discovery of the embezzlement was a very difficult matter.

Robert C. O'Dell, a certified public accountant employed by Haskins & Sells, testified that he and his assistants spent more than 30 weeks making an audit of the bank for the Department of Banking to determine which loan accounts were overstated. He explained in detail how it was necessary to work from the tape of the proof machine which contained entries for all of the transactions of the bank on a particular day. He stated that it would be a "Herculean task" to trace particular loans through from origination because of the methods used by Davenport.

Lane Nansel, a senior examiner for the Department of Banking who participated in the October 13, 1964, examination, testified that during the third week of the examination, when the examiners were tracing the proceeds of notes, it "entailed quite a number of hours of labor." An entire day was spent checking the St. Francis Educational Society account.

The Deputy Director of Banking testified that an audit by independent certified public accountants would not have disclosed the embezzlement. Only a verification of each note and deposit account would have disclosed the embezzlement.

At no time did the Department of Banking suspect that there had been an illegal diversion of funds. The department thought Davenport was a poor loan man and that his loan policy would eventually destroy the bank. This is the same matter that concerned the defendant and caused him to call the Deputy Director of Banking on May 19, 1964.

On October 22, 1964, the joint examination had been completed and the examiners were ready to leave the bank. Although this examination had included a verification of from 15 to 20 percent of the accounts and an investigation of the disposition of proceeds from

notes, no irregularities had been discovered. It was only at the urging of the defendant that further examination and investigation was made which eventually disclosed the embezzlement.

As we view the record, a reasonable trier of fact could find that the plaintiff had failed to prove that the loss was caused by negligence of the defendant in failing to detect and discover the embezzlement by Richard L. Davenport.

It is unnecessary to consider further the issues raised by the cross-appeal.

The judgment of the district court is reversed and the cause remanded with directions to reinstate the verdict and dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent. The record I believe discloses that the defendant Colburn, as a director of the bank, exercised not the slightest degree of care to prevent or detect defalcations such as here occurred. The record shows that from the time he first became a director he abdicated completely his responsibilities as such and left the entire, complete, and absolute control of the bank in the hands of the bank manager. He did not in all those years even suggest a director's audit with independent random verification of accounts and loans. He did not suggest any of the internal controls which might prevent, discourage, or lead to the detection of defalcations. A bank directorship is not an honorary position. Depositors and stockholders rely upon the directors to fulfill their obligations. Directors who do not wish to exercise their responsibilities should resign if they wish to avoid responsibility for their defaults. Colburn was negligent as a matter of law because he did not exercise even slight care. Gibbons v. Anderson, 80 F. 345; Gamble v. Brown, 29 F. 2d 366, cert. den. 279 U. S. 839, 49 S. Ct. 253, 73 L. Ed. 986; Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S. W. 803; 25

A. L. R. 3d, Directors—Liability for Defalcations, § 18, p. 1011; Atherton v. Anderson, 99 F. 2d 883; Anderson v. Bundy, 161 Va. 1, 171 S. E. 501; Lippitt v. Ashley, 89 Conn. 451, 94 A. 995.

I do not suggest of course that one director alone can take appropriate precautions without the joinder of the majority of the directors. Proksch v. Bettendorf, 218 Iowa 1376, 257 N. W. 383. In this case the record shows that all of the directors abdicated their responsibilities. Under these circumstances whether the defendant could have done anything effective to prevent or to earlier detect the defalcations is open to debate. Therefore, whether the defendant's negligence was the proximate cause of the bank's losses presented a jury question. The trial court properly set aside the verdict and on retrial only the questions of proximate cause and the amount of damages, if any, would be jury questions.

GARRY E. RUDY ET AL., APPELLEES, V. WARREN S. WAGNER ET AL., APPELLANTS, IMPLEADED WITH ROBERT K. RUDY ET AL., APPELLEES.
198 N. W. 2d 75

Filed May 26, 1972. No. 38134.

1. **Estates: Wills.** The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect.
2. **Estates: Wills: Words and Phrases.** The words "in the event of death," "in case of death," or "at his death" do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant.
3. **Estates: Wills.** In the absence of provisions indicating the contrary, a remainder granted in a will to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child.

4. ———: ———. A devise to children as a class of the remainder over after a life estate vests the title to the estate in remainder in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate from the moment of their birth. The estate in remainder when once vested does not lapse by reason of the death of a beneficiary prior to the expiration of the life estate unless the will so provides.
5. ———: ———. Where the language conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate, the vested interest of such member of the class does not lapse but descends to his heirs.
6. ———: ———. Under the testamentary language involved here, the devise of a remainder over after a life estate was to the children of the life tenant as a class; the estate in remainder vested in each of them as they were born during the continuance of the life estate, and did not lapse as to a child who predeceased the life tenant. The remainder was defeasible only in the event of the death of the life tenant, leaving no child or children.

Appeal from the district court for Hamilton County: JOHN D. ZEILINGER, Judge. Affirmed.

E. Harold Powell and John E. Dougherty, for appellants.

Adams & Carstenson, for appellees Garry E. Rudy et al.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and COLWELL, District Judge.

McCOWN, J.

This was an action for the partition of certain real estate in Hamilton County, Nebraska. The ownership interests involved are dependent upon the construction of a will executed in 1907 by one Matthias Wagner.

Matthias Wagner died testate in 1913, leaving his wife and seven children surviving him. The fourth paragraph of that will is the specific portion directly involved here. It provided: "I give, devise, and bequeath unto my beloved son, Carl Wagner the following described real estate, to-wit:- The South One Half of the South

East Quarter (S.½S.E.¼), of Section nineteen (19), Township Ten (10) North, Range Seven (7), West of the Sixth (6th) Principal Meridian, and situate in Hamilton County, Nebraska, for and during his natural life: At his death the remainder shall vest in his children born in lawful wedlock, and in the event of said Carl Wagner dying and leaving no legitimate child or children, the remainder shall vest in my surviving child or children, share and share alike as tenants in common, and if none of my children be then surviving such remainder shall vest as aforesaid in my surviving grandchildren." Matthias also devised other specific pieces of real estate to other specific children for their natural lives with virtually identical provisions as to the remainder interests. He also devised a lot outright to each of his children, the lots to be carved out of a described parcel of land.

Carl Wagner, the life tenant under paragraph Four, was married in 1912. He had three children, Glena Wagner Rudy, born in 1914; Warren S. Wagner, born in 1921; and Bonnie N. Wagner, born in 1927. Glena Wagner Rudy died intestate in 1947. Her heirs-at-law were Kenneth G. Rudy, her husband; two sons, Garry E. Rudy, the plaintiff; and Robert K. Rudy, one of the defendants. Glena's husband, Kenneth, subsequently married Glena's younger sister, Bonnie Wagner.

Carl Wagner, the life tenant under the will, died in 1963. He was survived by his children, Warren S. Wagner and Bonnie Wagner Rudy, and by the husband and children of Glena Wagner Rudy, who had predeceased her father.

The plaintiff, Garry E. Rudy, commenced this partition action thereafter. The district court found that Glena Wagner Rudy died intestate in 1947, seized of an estate of inheritance in an undivided one-third interest in the real estate, which descended to her heirs-at-law, her husband and her two sons, an undivided one-ninth interest each. Other issues involving improvements

were reserved for later determination and decree was entered accordingly.

The appealing defendants contend that under the language of the will, the remainder interests in the real estate did not vest in the children of Carl Wagner until his death, and the remainder interest then vested only in his children who survived him and were then living. The plaintiffs' position is that the remainder interest of each lawful child of Carl Wagner vested upon his or her birth, subject to defeasance only if no child or children of Carl Wagner survived him.

The authorities and our cases agree that the intent of the testator is controlling. Here the testator clearly devised the remainder interest in this property to the children of his son, Carl Wagner. The critical issue is whether the disposition was limited to those children who survived the life tenant. In another sense, the issue may be said to be whether or not the remainder interest of the children of the life tenant vested upon the birth of each or was contingent and postponed to vest only when and if that child survived the life tenant.

The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect. Davis v. Davis, 107 Neb. 70, 185 N. W. 442.

Our cases consistently reflect that policy, Baldwin v. Colglazier, 173 Neb. 775, 114 N. W. 2d 890, involved 1 of 11 similar paragraphs in a will. The testator devised the property to his daughter "to be hers during her natural life only, and in the event of the death of my daughter * * * shall be and is hereby bequeathed to her children and in the event of no issue or children surviving my daughter * * * shall revert to my legal heirs." The life tenant had two children, one of whom predeceased the life tenant leaving three children of his own. The surviving child of the life tenant sought to quiet

title in herself. The court stated: "The words 'in the event of death' appear synonymous with the phrase 'in case of death.' In the decisions of this court such phrases do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant. (Citing cases.)" "At his death" is equally ineffective to postpone vesting.

The court specifically rejected the claim that because the remainder estate given to the children of the life tenant was subject to defeasance or limitation if the life tenant should die without issue or children, the estate granted to the children of the life tenant was contingent on their surviving the life tenant. This court held that in the absence of provisions indicating the contrary, a remainder granted in a will to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child.

Strawhacker v. Strawhacker, 132 Neb. 614, 272 N. W. 772, is persuasive upon several aspects of the issue involved here. In that case, a deed was "to Andrew M. Strawhacker for and during his natural life and at his death, to his present wife Genevieve and her children. Now of the town of Minonk, county of Woodford and state of Illinois." On the date of the deed, the life tenant and his wife, Genevieve had one child. After the execution and delivery of the deed, seven additional children were born. The one child who was living on the date of the deed predeceased the life tenant, leaving a widow and one son. Another child born after the deed also predeceased the life tenant. This court held that the estates of both deceased children should share in the remainder estate equally with those who survived the life tenant. This court quoted with approval the rule that: " 'A bequest or devise to a class of the remainder over after a life estate vests the title to the estate in remainder in those of the class in esse at the death of the testator; the right of enjoyment of posses-

sion, however, is deferred until the expiration of the preceding estate. The estate in remainder, when once vested as upon the death of the testator, does not lapse by reason of the death of a beneficiary prior to the expiration of the life estate unless the will so provides, as by a limitation over in the event of the death of a remainderman before that of the life tenant. But the class will open up and let in those born during the continuance of the life estate, who belong to the class designated in the will. This general rule is held to apply particularly to gifts to children as a class, and in all such cases the estate in remainder vests in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate, from the moment of their birth.' 2 Alexander, Commentaries on Wills, sec. 890."

The case also quotes with approval the rule that: " 'Where the distribution to or among children is to come after a prior life estate, a different rule is applicable than where it is immediate; for if the distribution or the possession of the property devised in remainder to children is not to be made or enjoyed until a period has elapsed subsequent to the death of the testator, a gift to children as a class will embrace not only all children who are living at the testator's death, and compose the class at that time, but also all who are born before the period of distribution arrives.' "

In the Strawhacker case this court concluded that the remainder interest immediately vested in Genevieve Strawhacker and her then only son at the time the deed was executed and delivered, and as each subsequent child was born during the continuance of the life estate, he became a member of the class and his interest in the land immediately vested. The court noted that each of the eight children became vested with an undivided interest in the land as they entered the class.

In Semrad v. Semrad, 155 Neb. 209, 51 N. W. 2d 264, parents conveyed land by deed to Mary Semrad, their

daughter. The deed contained a provision that: "Grantors reserve the right that Mary Semrad (their daughter) can not convey or sell the above described land to any person during her natural life, and in case of Mary Semrad death said above described land should be divided among her own children, and in case there should be no children after Mary Semrad then in that case the above described land should revert back to the Grantors above mentioned." Nine children were born to Mary Semrad. Two of her children predeceased her leaving surviving children. This court regarded the Strawhacker case as determinative of the issue, and held that the remainder interest vested in each child of the life tenant upon birth during the continuance of the life estate. It specifically reaffirmed the rule that where the language conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate, the vested interest of such member of the class does not lapse but descends to his heirs.

The cases referred to, while they do not deal with identical language, are nevertheless persuasive and ample authority here. They are in accord with the great weight of authority in those states which favor early vesting rather than a postponed contingent construction as to remainder interests. See cases cited in companion Annotations, 57 A. L. R. 2d 103-234, inclusive.

The appealing defendants contend that the words "at his death the remainder shall vest" were intended to create only a contingent remainder and therefore postpone its vesting until the death of the life tenant. It seems clear to us that the language used indicates only that distribution or possession and enjoyment was postponed until the death of the life tenant. As the court indicated in Baldwin v. Colglazier, *supra*, a similar reference to the death of the life tenant "refers to the time the children should enter into the enjoyment of their estate." The language of the will does not restrict the

grant to a contingent remainder which never vested in Glena Wagner Rudy because she did not survive the life tenant. It should be noted also that there is no specific language in the will of Matthias Wagner which requires that survival of a remainderman is a condition of taking. The disposition of the remainder interest to the children of Carl Wagner is not by its terms limited to "surviving" children, but instead goes simply to "his children."

The appealing defendants want to have the language of the will interpreted as though it contained words such as "surviving" or "then living" when it referred to the children of the testator's son, Carl Wagner. Obviously it does not. We point out, however, that later in the same sentence, the testator used the word "surviving" when he referred to his own child or children as well as when he referred to his grandchildren when he provided for limitation over in the event Carl Wagner left no legitimate child or children.

The pattern of testamentary disposition and the language of the will of Matthias Wagner convince us that the testator had no intention to limit the class of the children of Carl Wagner to those children who survived their father, the life tenant. Under the testamentary language involved here, the devise of a remainder over after a life estate was to the children of the life tenant as a class; the estate in remainder vested in each of them as they were born during the continuance of the life estate, and did not lapse as to a child who predeceased the life tenant. The remainder was defeasible only in the event of the death of the life tenant, leaving no child or children.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

H. H. NEUMEYER ET AL., APPELLEES, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.

198 N. W. 2d 80

Filed May 26, 1972. No. 38253.

1. **Appeal and Error: Bonds: Statutes: Eminent Domain.** The execution and approval of the undertaking required in section 76-716, R. R. S. 1943, is directory only.
2. **Appeal and Error: Bonds: Statutes: Eminent Domain: Case Overruled.** Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold that section 76-716, R. R. S. 1943, is mandatory and jurisdictional, they are overruled.
3. **Appeal and Error: Courts: Pleading: Time.** Where a discretionary duty is imposed upon a district court to determine whether or not good cause has been shown to grant leave to a party to plead out of time, its decision will not ordinarily be disturbed absent showing abuse of discretion.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Fraser, Stryker, Marshall & Veach, for appellant.

Matthews, Kelley, Cannon & Carpenter, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Omaha Public Power District, appellant, hereafter called condemner, appeals a jury verdict and judgment of $10,072.50 in the district court for Douglas County, Nebraska, for a transmission line easement. Condemner assigns as error: (1) The district court had no jurisdiction because plaintiffs, H. H. Neumeyer and Esther Neumeyer, hereafter called condemnees, failed to secure approval of and file with the county judge their appeal bond within 30 days following the filing of the report of appraisers, contrary to section 76-715, R. R. S. 1943; and (2) the district court erred in overruling condemner's motion to dismiss on the grounds that condemnees

failed to file their petition on appeal within the 50-day period provided by law, and no good cause was shown for its late filing. We affirm the judgment.

A brief summary of the pleadings is necessary. The report of appraisers was filed in the county court on January 18, 1968; condemnees filed notice of appeal and affidavit of service of notice of appeal on January 30, 1968; corporate appeal bond in due form, dated February 16, 1968, was filed and approved on February 23, 1968, 36 days after the filing of report of appraisers; transcript filed in the district court on February 29, 1968; on March 15, 1968, condemner filed motion to dismiss for lack of jurisdiction because of the late filing of the appeal bond; on March 29, 1968, condemnees filed petition on appeal without leave of court; on April 1, 1968, condemner filed motion for nonsuit for filing petition more than 50 days after notice of appeal; on May 6, 1968, condemner filed motion for summary judgment; and on May 16, 1968, condemnees asked leave to file petition on appeal out of time. All of condemner's motions were denied. The issues were tried to a jury in May of 1971. Condemner preserved the asserted jurisdictional objections and appeals the judgment.

"The securing of an appraisal of damages by the appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding. The method of appeal is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court. The present appeal statute contemplates the filing of pleadings and the framing of issues for the first time in the judicial proceedings in the district court." Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591.

As to the first claimed error, this question has not been met directly since the present eminent domain statutes were enacted in 1951. However, two cases are close to the issue. In Jacobitz v. Bussinger, 179 Neb.

524, 138 N. W. 2d 839 (1965), the report of appraisers was filed on January 16, 1964, notice of appeal was filed on February 14, 1964, and on the same date an incomplete bond was tendered to the county judge who questioned its propriety. It was approved and stamped filed on February 19, 1964. This court said: "Where the record shows that an appeal bond was delivered to the proper official within the time provided by law, a delay by the official, for his own reasons, in actually performing, entering, or recording the official filing should not prevent the district court from acquiring jurisdiction on appeal." The court also stated: "While the statute is mandatory in requiring an appeal bond in appeals from appraisals * * * and the bond must be filed within the time prescribed by statute, the filing date stamped on it, or the time the official records the formal filing, is merely prima facie evidence of the time it was received." In Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41 (1967), the plaintiffs therein gave notice of appeal and filed the required appeal bond, transcript of proceedings, and petition on appeal in the district court. The defendant gave notice of appeal, filed transcript of proceedings, and answer to petition on appeal in the district court, but filed no appeal bond. Plaintiffs dismissed their appeal and the district court dismissed defendant's appeal. This court, holding that the defendant had no pleading on file in the nature of a cross-petition, stated: "Section 76-716, R. R. S. 1943, requires: 'The party appealing shall also, at the time of filing notice of appeal, enter into an undertaking, * * *.' Defendant as a cross-appellant, was simply a 'party appealing' within the purview of this statute and was not exempt from complying with its provisions. Had it so complied, it would have completed a separate appeal which would not have been subject to dismissal on dismissal of the plaintiffs' appeal."

Jurisdiction "may be defined in law as the power to

hear and decide a legal controversy." Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N. W. 1058.

"In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately." In re Application of Silberman, 153 Neb. 338, 44 N. W. 2d 595.

We first examine related statutes: "Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed. Such appeal *shall be taken by filing a notice of appeal* with the county judge *within thirty days* from the date of filing of the report of appraisers as provided in section 76-710." § 76-715, R. R. S. 1943. (Emphasis supplied.) This section directs with clarity the manner of taking appeal, including the time and requirement of filing the notice. It is mandatory and jurisdictional. See Friedman v. State, 183 Neb. 9, 157 N. W. 2d 855.

"The party appealing from the award for assessment of damages by the appraisers in any eminent domain action *shall, within thirty days* of the filing of the award, *file a notice of appeal* with the county judge, specifying the parties taking the appeal and the award thereof appealed from, and *shall serve a copy of the same* upon all parties bound by the award or upon their attorneys of record." § 76-715.01, R. R. S. 1943. (Emphasis supplied.) This section restates the requirement of filing the notice set out in section 76-715, R. R. S. 1943, and further requires service of notice on the parties and counsel. Again, it is clear that this section is also mandatory and jurisdictional. See Radil v. State, 182 Neb. 291, 154 N. W. 2d 466.

Section 76-717, R. R. S. 1943, provides: "Within thirty days after the filing of such *notice of appeal,* the county

judge shall prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings * * *. When *notice of appeal* is filed by both the condemner and the condemnee, such transcript shall be prepared only in response to the first notice of appeal; the transcript prepared in response to the second notice of appeal shall contain only a copy of such notice * * *." No reference is made to either the filing of an undertaking or including it in the transcript. In City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537, relating to this section, it was held: "* * * we hold that the 50-day period for the filing of a petition in the district court on an appeal in eminent domain proceedings * * * begins to run with the date of the *filing of notice of appeal* in the county court." (Emphasis supplied.)

The statute in question here, section 76-716, R. R. S. 1943, provides: "The party appealing *shall also, at the time of filing of notice of appeal,* enter into an undertaking, with at least one good and sufficient surety, to be approved by the county judge conditioned (1) that the appellant will prosecute such appeal to effect without unnecessary delays, and (2) that if judgment be rendered against appellant on the appeal, the appellant will satisfy whatever judgment may be rendered against him." (Emphasis supplied.) Appellants are required to (1) execute an undertaking with surety and statutory conditions, (2) to do so at the time of filing notice of appeal, and (3) secure the approval of the county judge. These things are to be done in addition to the jurisdictional requirements of sections 76-715 and 76-715.01, R. R. S. 1943. The filing of the undertaking is not provided. There is no clear language relating the execution of the undertaking as a step necessary to vest the district court with jurisdiction and we think none was intended by the Legislature, rather jurisdiction in all eminent domain appeal statutes is keyed to the provision in section 76-715, R. R. S. 1943, that such "appeal

shall be taken by filing a notice of appeal."

We hold that sections 76-715 and 76-715.01, R. R. S. 1943, state the jurisdictional requirements for an appeal from the report of appraisers in eminent domain proceedings, and that section 76-716, R. R. S. 1943, is directory only. To hold otherwise would convert clear, brief language into a jurisdictional maze. Insofar as Jacobitz v. Bussinger, *supra,* and Gebhart v. Tri-State Generation & Transmission Assn., *supra,* hold that section 76-716, R. R. S. 1943, is mandatory and jurisdictional, they are overruled.

Relating to condemner's second claimed error, condemnees made as a showing of good cause for the late filing of the petition on appeal that condemners had on file a pending motion to dismiss condemnees' appeal for lack of jurisdiction. Where a discretionary duty is imposed upon a district court to determine whether or not good cause has been shown to grant leave to a party to plead out of time, its decision will not ordinarily be disturbed absent showing abuse of discretion. See Jensen v. Omaha Public Power Dist., *supra.* Condemnees did file their petition on appeal 9 days late. The trial court did not abuse its discretion.

There being no error in the proceedings we affirm the judgment.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the opinion of the court except that I would not include *service* of the notice of appeal as a jurisdictional requirement.

McCOWN, J., joins in this concurrence.

FLOYD MELCHER, APPELLANT, V. BOESCH MOTOR COMPANY, A PARTNERSHIP, ET AL., APPELLEES.
198 N. W. 2d 57

Filed May 26, 1972. No. 38259.

1. **Warranty: Contracts: Trial: Evidence.** The burden of proof is on the party relying on a breach of warranty to show performance of conditions as to which the right to assert the warranty depends, or waiver thereof, or excuse for nonperformance.
2. **Warranty: Contracts: Trial: Courts.** The issue of whether a provision of express warranty is unconscionable presents a question of law for the court.
3. **Appeal and Error: Evidence: Judgments.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.
4. **Appeal and Error: Evidence: Verdicts.** A jury verdict based upon conflicting evidence will not be set aside unless it is clearly wrong.
5. **Appeal and Error: Evidence.** It is not the province of this court in reviewing the record in a law action to resolve conflicts in or weigh the evidence.
6. **Trial: Verdicts.** Objections to the forms of verdict should be made before or at the time the verdict is returned.
7. **Trial: Verdicts: Damages: Appeal and Error.** If the jury finds the defendant not liable in a breach of warranty action, an error relating to the subject of damages is necessarily harmless.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

George H. Moyer, Jr., and Moyer & Moyer, for appellant.

Jewell, Otte, Pollock & Gatz and Robak & Geshell, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

BUCKLEY, District Judge.

This is an appeal by the plaintiff, Floyd Melcher, from a jury verdict and a judgment for the defendants Boesch Motor Company, a partnership, hereafter called

"Boesch," and Ford Motor Company, a corporation, hereafter called "Ford," in an action for damages based upon a breach of express warranty.

Plaintiff alleged in his petition that on April 14, 1967, he purchased a new Ford pickup truck from Boesch, a sales and service dealer of Ford products, in Humphrey, Nebraska. From the beginning, the truck used an abnormal amount of oil, until, when it had been driven nearly 25,000 miles, it threw a connecting rod and destroyed the engine. His petition seeks damages for breach of Ford's express warranty of the engine block, head, and all internal parts to be free from defects in material and workmanship.

The defendants in their answers deny that the engine failure was caused by factory defective material or workmanship; and for affirmative defenses allege that plaintiff: (1) Failed to comply with the required maintenance services which form a condition precedent to liability on the warranty, (2) subjected the truck to abnormal use by operating it without sufficient oil contrary to warranty requirements, and (3) materially altered the motor, by converting the fuel system to propane without the consent of the defendants.

The material portions of the warranty are:

"BASIC WARRANTY

"Ford Motor Company warrants to the owner each part of this vehicle to be free under normal use and service from defects in material and workmanship for a period of 24 months from the date of original retail delivery or first use, or until it has been driven for 24,000 miles, whichever comes first.

"POWER TRAIN WARRANTY

"In addition, Ford Motor Company further warrants to the owner each part of the engine block, head, and all internal engine parts, . . . and all internal transmission parts . . . of this vehicle to be free under normal use and service from defects in material and workmanship for a period five (5) years from the date of

original retail delivery or first use, or until it has been driven for fifty thousand (50,000) miles, whichever comes first. . . .

"GENERAL WARRANTY PROVISIONS

"It is a condition of both these warranties that the owner maintain this vehicle according to the required maintenance services set forth in the Maintenance Schedule in this Owner's Manual. It is also a condition of both of these warranties that, every twelve months, the owner furnish an authorized Ford or Lincoln-Mercury dealer with evidence that these maintenance services have been performed and obtain the dealer's written certification that he has received such evidence.

"Both of these warranties shall be fulfilled by the Selling Dealer. . . .

"The warranties-herein are expressly IN LIEU OF any other express or implied warranty, including any implied WARRANTY of MERCHANTABILITY or FITNESS, and of any other obligation on the part of the Company or the Selling Dealer."

Plaintiff complains that the trial court should not have submitted to the jury the defense of his failure to comply with the service requirements and to obtain the required certification of such compliance, for two reasons: (1) There is no evidence that he failed to perform the required maintenance or that any failure caused or contributed to the loss, and (2) the requirement that plaintiff obtain from defendants a certification of compliance is unconscionable and unreasonable and, therefore, unenforceable.

Plaintiff read the operator's manual furnished him by Boesch when he received the truck. It contains the warranty and also the maintenance schedule setting forth the required maintenance services. One of them is "Change Rotunda Motor Oil and Autolite Oil Filter" every 6,000 miles. The schedule also requires that this service, as well as many others not material here, "must be performed as indicated, and certified by

an authorized Ford dealer every 12 months, to keep the warranties in force. You must show the dealer the bills for any outside services and they must indicate that parts and lubricants of Autolite, Rotunda or equivalent quality were used."

Plaintiff, a young farmer living near Madison, Nebraska, used the pickup truck for general farm work, including hauling gas cans and pulling wagons. When the truck had 1,612 miles, he took it to Boesch for a 1,000 mile check and a change of oil and filter. After that he testified he changed the oil and the filter himself at 2,573, 4,700, 7,010, 8,812, 10,410, 13,062, 14,374, 16,526 and 20,735 miles (defendants do not contend that any oil or filter used did not meet warranty specifications as to quality). He stated he took the truck to Boesch at 8,300 miles, again at 12,000 miles, at 18,000 miles, and at 24,000 miles and told them to make a check but didn't know if they did or not. He asked about the required certifications but was told each time it wasn't necessary and did not obtain any. No charges were made for any warranty service check-ups, and both Jerry Boesch and Harry Boesch, partners of Boesch, the two parties plaintiff dealt with, deny that plaintiff ever asked the required services be performed, or that he showed evidence they had been done, or that he requested certifications they were done.

This conflict in testimony presents a question of fact for the jury as to whether the plaintiff complied with the service requirements, and that issue was properly submitted.

Whether, as defendants contend, the failure to comply with these service requirements caused the engine failure is immaterial. Plaintiff grounds his cause of action upon a breach of the express warranty. The service requirements and certifications were conditions precedent to be performed by plaintiff. The burden of proof is on the party relying on a breach of warranty to show performance of conditions as to which

the right to assert the warranty depends, or waiver thereof, or excuse for nonperformance. Worden v. Sycamore Marsh Harvester Co., 11 Neb. 116, 7 N. W. 756; 77 C. J. S., Sales, § 365, p. 1283. See, also, Metschke v. Marxsen, 176 Neb. 240, 125 N. W. 2d 684.

For his reply to defendants' answers that no required certifications were obtained, plaintiff asserts that such a provision is unconscionable and unreasonable and, therefore, unenforceable. He asserts error in failing to instruct the jury on this issue.

It is not a jury question. The conscionability of the provision became a matter of law for the court. § 2-302, U. C. C. It is commented, under that section, that: "The basic test is whether in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."

The basis for the certification clearly is reasonable. The requirements of an owner to properly maintain the engine of his vehicle in exchange for a warranty that it is free of defect in material and workmanship at time of delivery go hand-in-hand. But plaintiff contends that the required certification puts Ford and Boesch in the position of sole arbitors as to what is sufficient maintenance and he cites Mills v. Maxwell Motor Sales Corp., 105 Neb. 465, 181 N. W. 152, and Henningsen v. Bloomfield Motors, 32 N. J. 358, 161 A. 2d 69, 75 A. L. R. 2d 1. Both cases involved warranties similar to the one involved here, but both required that the alleged defective parts be shipped to the manufacturer's factory, where it reserved the right to determine if the parts were defective. In Mills v. Maxwell Motor Sales Corp., *supra,* we said: "It would,

nevertheless, be repugnant to every conception of justice to hold that if the parts thus returned for examination were, in point of fact, so defective as to constitute a breach of the warranty, the appellee's right of action could be defeated by the appellant's arbitrary refusal to recognize that fact. Such an interpretation would substitute the appellant for the courts in passing upon the question of fact, and would be unreasonable. *The provision in question should not be so construed upon a retrial of this cause.*" (Emphasis supplied.) The certification requirement should not be so construed here, as it would give Boesch and Ford the unqualified right to refuse the certification and defeat plaintiff's claim. While the plaintiff must furnish Boesch with evidence of performance of the required maintenance services, Boesch may not then unreasonably withhold the certification. If it does, the condition precedent that plaintiff obtain such certification is waived. Thus construed, the provision is not unreasonable.

Plaintiff assigns as error instruction No. IV, wherein the jury was instructed in part that: "In this case the plaintiff has offered evidence suggesting that demand was made on the defendant Boesch Motor Company for the performance of all required service checks and appropriate certification. If you find by a preponderance of the evidence that such fact has been established, the performance of the conditions precedent to the enforcement of the warranty contract are waived; that is, the law does not require them." The instruction correctly construed the applicability of the required certification.

Plaintiff assigns as error the submission of the issues of abnormal use and material alteration to the jury, contending that neither issue was supported by competent evidence.

In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party. Haney v.

L. R. Foy Constr. Co., Inc., 186 Neb. 528, 184 N. W. 2d 628; McGerr v. Beals, 180 Neb. 767, 145 N. W. 2d 579.

A jury verdict based upon conflicting evidence will not be set aside unless it is clearly wrong. Haney v. L. R. Foy Constr. Co., Inc., *supra*.

It is not the province of this court in reviewing the record in a law action to resolve conflicts in or weigh the evidence. Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124.

Plaintiff testified that the truck used too much oil from the beginning, but he vascillated considerably as to the actual oil consumption. Generally he said the oil consumption gradually increased from the time he got the pickup until the engine blew up. Otherwise he ranged from a quart per 300 to 500 miles at the start to six quarts in the first 1,000 miles, from two to three quarts per 1,000 up to 10,000 miles, to three to five quarts at 10,000 miles, from no change from 10,000 to 15,000 miles to "getting worse after ten to twelve thousand miles," from three to six quarts at 15,000 miles, six to seven quarts at 17,000 miles, increasing after that to a quart per 100 miles at the end.

The evidence indicates one quart of oil per 750 miles is an acceptable rate of oil consumption at 10,000 miles, which should not change up to 24,000 miles.

A mechanic examined the engine nearly 2 years after it blew up. He found that the two rear rods had come loose from the crankshaft and burned out, and one went through the side of the block. The other rod bearings showed excessive clearance between them and the crankshaft indicating a lack of oil pressure to them. This excessive clearance would cause oil to escape around the bearings and be thrown to the cylinder walls where it can more easily be picked up by the rings and burned. He removed the cylinder heads and found that the intake valves were oily and had excessive clearance in the valve guides. This indicated that oil was drawn down the valve guides and into the cylinder. He gave

his opinion that the excessive clearance in the valve guides was caused by a defect in material or workmanship at the time of manufacture, which in turn resulted in excessive oil consumption, in turn causing unusual engine wear, and finally causing the rod bearing to go out.

There is no evidence to refute plaintiff's contention that the truck used large amounts of oil or that the bearing failure was directly attributable to either a lack of sufficient oil or any oil at all. The mechanic stated that the loose valve guides would cause the engine to be constantly low on oil, that the rod bearings and main bearings were scuffed, probably from being low on oil, and that the exhaust valves had an abnormal amount of carbon deposits, indicating a high rate of oil consumption.

The jury could have found from the evidence that plaintiff operated the truck without sufficient oil during all the time he complained of excessive oil consumption, and that he did not bring this problem to the attention of Boesch until the truck had 18,000 to 20,000 miles, at which time successive 2,000 and 3,000 mile oil consumption checks were made by the plaintiff at Boesch's direction. The second check was in progress at the time the engine went out. At that time plaintiff and two brothers-in-law checked the oil level and found it a quart and one half low. Boesch towed the truck to its garage the next day and there no oil showed on the dipstick. When the engine was drained, about a cupful of oil remained. Some oil could have escaped in the towing.

In addition, the Ford operator's manual provides for six quarts of oil to be used when changing the oil and oil filter. When plaintiff changed the oil and filter himself, he did not use quart cans but poured it from a 5 gallon can until it was full.

The evidence clearly warranted the submission of the defense of abnormal use to the jury. The court instructed the jury that: ". . . you shall consider such

abnormal use if shown by a preponderance of the evidence, . . . along with all other evidence in determining whether the defects complained of by the plaintiff were in existence at the time of the delivery of the pickup . . . ." The instruction correctly limited the jury's consideration of abnormal use to one of evidence in its essential determination, namely, whether the engine failed because it was defective at the time of delivery to the plaintiff. Plaintiff's assignment of error is without merit.

Plaintiff also attacks the defense of material alteration on the same basis, namely that there was no evidence showing the conversion to propane increased oil consumption or caused any other engine defect that could have caused the rod bearing to go out. As stated previously, the evidence unequivocally established that the engine failure was caused by the engine being operated without sufficient oil for a considerable length of time resulting from excessive oil consumption. But plaintiff contends that there is no evidence to causally relate the increase in oil consumption to the propane conversion.

The warranty does not prohibit such a conversion to propane. The conversion involves the carburetor system, with a different carburetor, fuel tank, fuel pump, and fuel filter being installed. Special piston rings, valve seats, and intake manifolds are used in factory propane engines. There is no evidence that such parts were used in the conversion here.

The piston rings must seal to the cylinder wall to the point where oil won't go around them and be burned up. This "seating of the rings" is a part of the breaking in of the engine and takes approximately 6,000 miles to complete. Therefore, it is expected that oil consumption would be relatively high for the first 1,000 miles, but should steadily improve until the rings are seated.

While the evidence was conflicting, the jury could

have found that it is more difficult to seat rings in a propane engine, and that an engine should not be converted to propane until the rings are seated. Plaintiff was told by Jerry Boesch that he didn't think the rings were seated at 10,000 miles, and he felt if they weren't seated by then they never would be, so plaintiff converted to propane at 10,000 miles without telling Boesch.

Among conflicting testimony by the plaintiff himself, he stated initially on direct examination:

"Q. Did you notice any change in the oil consumption as you drove the pickup more miles?

"A. Not a lot, until I got over ten, twelve thousand miles. After that it started getting worse. Up to then it stayed about the same.

"Q. When it got up to ten or twelve thousand miles, then what did the oil consumption do?

"A. It kept getting worse."

As to the defense of abnormal use, the court instructed the jury that it could consider the conversion to propane as evidence in determining whether the defects complained of existed at the time of delivery of the truck to plaintiff. From the evidence, the jury was entitled to conclude that the conversion to propane was instrumental in the lack of seating of the piston rings, which directly resulted in the increased oil consumption that led to the engine failure. The defense of material alteration was properly submitted to the jury by the instruction given.

Plaintiff assigns as error the failure of the trial court to give the jury four forms of verdict instead of two. The forms of verdict submitted were: (1) "For the plaintiff, and assess the damages at $————." (2) "For the defendants." In his brief, plaintiff says: "By its sixth instruction, the Court told the jury that the defendants were jointly and severally liable. Obviously this required four forms of verdict." Since plaintiff does not assign as error the giving of that instruction,

we presume he contends there was some basis for a finding by the jury of liability against one defendant and not the other, but he does not mention this in his brief or oral argument.

The warranties were issued by Ford but delivered to the plaintiff by Boesch. They provide that "Both these warranties shall be fulfilled by the Selling Dealer . . . ." Plaintiff called upon both Boesch and Ford to replace the engine under the warranty. The rights and obligations of Boesch and Ford on the warranty to the extent involved in this case were identical. The two forms of verdict were the only ones which the jury could have returned on the issues.

The record is silent as to any conference on instructions or forms of verdict. Plaintiff objected for the first time in his supplemental motion for new trial. Objections to the forms of verdict should be made before or at the time the verdict is returned. McGrew Machine Co. v. One Spring Alarm Clock Co., 124 Neb. 93, 245 N. W. 263; In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185.

Plaintiff complains that the trial court withdrew from the jury the element of incidental and consequential damages. The verdict was necessarily a finding by the jury that the defendants were not liable under the terms and conditions of the express warranty. The error, if any, in any instructions stating the measure of damages must necessarily be harmless. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

RUTH I. LAKE, APPELLEE, V. CLYDE P. SOUTHWICK ET AL., APPELLANTS.
198 N. W. 2d 319

Filed May 26, 1972. No. 38302.

1. **Damages.** The process of ascertaining the amount of compensation to be awarded for impairment of the capacity to work or to earn requires (1) the determination of the extent to which such capacity has been diminished, (2) the determination of the permanency of the decrease in earning capacity, and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth.
2. **Damages: Evidence.** Damages for future loss of earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence as reasonably certain and proximately resulting from the pleaded injury.
3. **Trial: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Wilson, Barlow & Watson and Kile W. Johnson, for appellants.

Bauer & Galter, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

This is a personal injury case. Plaintiff Ruth I. Lake received serious and painful injuries in a two vehicle collision on May 16, 1970, on a four-lane highway 1 mile west of Lincoln, Nebraska. Plaintiff driving her family car west in the left lane collided with a truck driven by defendant Clyde P. Southwick, employed by defendant Lawrence L. Sintek. Both car and truck were proceeding west on the highway, and they col-

lided when the truck made a left turn from the right lane in front of plaintiff's car and stopped in the median opening for turning, leaving part of the truck extended in plaintiff's lane and part in the eastbound lane. There was conflict in the evidence as to whether the turn signals were operating on the truck. The jury returned a verdict of $19,000 for plaintiff and judgment was entered for that amount. Defendants' motion for new trial was denied and this appeal was perfected. The issue of defendants' liability is not presented in this appeal. Defendants contend that the evidence does not support submitting to the jury the issue of damages for loss of future earning capacity, and in particular the evidence of the duration of the injury to plaintiff's knee was speculative.

At the time of the accident, plaintiff was 32 years of age, married, and living with her husband and three children in Lincoln, Nebraska. She was a graduate of the University of Nebraska and employed as a third grade teacher with 4 years teaching experience. In addition to her teaching duties she performed all usual household duties. Her general health was good.

As a result of the accident, plaintiff's injuries included cuts on her face, tongue, and inside mouth, one cut penetrating the tongue; five teeth loosened, permitting movement of one-eighth inch; bruised eye, face, arm, back, stomach, left knee, and both legs; and a severe 2 ¾ inch laceration midway between lip and point of chin where her teeth penetrated and were caught in the lip. It required 91 stitches to close the wounds to face, tongue, and inside mouth. She was hospitalized 4 days and confined to bed at home part of the time until the fall of 1970. Because of loose teeth and malocclusion plaintiff was unable to eat anything but soft foods until late in the fall of 1970.

In June of 1970 plaintiff moved with her family to Hastings, Nebraska, where her husband had accepted a teaching position. In November of 1970 plaintiff ob-

tained a position in the Hastings elementary school system teaching six students remedial mathematics and reading for half days, and she was so employed at the time of trial. Plaintiff continued irregular consultation and treatment with medical doctors and dental surgeons up to the time of trial on April 14, 1971.

At the time of trial, three of her teeth were still loose, there was inconclusive evidence of "pulp" testing conducted to determine if the injured teeth might be dead; plaintiff continued to experience difficulty in chewing food; all bruises had healed; the cut to the tongue had healed without resultant damage to either eating or speaking; the cut to the lip had healed with a fine line scar and a small raised mass in the middle, resulting in a permanent diminished sensation, and there is evidence that this condition affected plaintiff's speech at times, including some difficulty in speaking and pronunciation of words in her teaching duties; plaintiff regularly experiences fatigue and nausea; plaintiff's left leg was sore and ached most of the time, and always ached following prolonged walking, standing, riding in a car, and sitting; and she walked with a limp at times. Plaintiff testified that because of leg pain she could not teach full time, household duties were difficult, and she could not participate in family physical activities.

Dr. Harold R. Horn, M. D., an orthopedic surgeon, examined plaintiff in February 1971, finding objective tenderness over the posteromedial aspect of the left knee joint space, and a hyperesthesia or exaggerated sensation above it; there was no tenderness in the calf of the left leg, no fluid in the knee, no swelling, and no instability. It was his opinion that plaintiff's complaint of pain in her left leg was referred pain from her left knee. Further he related: "Q- Assuming further the same thing, she's working half days and at the end of a half day she feels pain in the leg and she becomes fatigued and tired, and a year has gone

by almost, do you have an opinion as to whether this will continue in the future? A- Yes. Q- And what is your opinion? A- It would appear that it should continue. Q- I would imagine this sort of thing is difficult to say how long it would continue. Is this correct? A- Yes. Q- From the examination you have made to this point, is there an indication of further medical treatment that's needed? A- Well, I would think so. Q- And do you know now, without further examination, what the nature of that might be? A- No." The doctor went on to explain some tests, surgery, and diagnosis that might be employed. On cross-examination, Dr. Horn said: "Q- And if she had some pain in her left leg since last fall, or early last fall, would you expect that eventually she might seek further diagnostic treatment? A- Yes. Q- And if further diagnostic testing indicated treatment of one kind or another, is there any reason to believe that something couldn't be done for Mrs. Lake that would relieve her of her symptoms? A- Well, I would certainly think so."

Defendants offered no evidenie relating to plaintiff's injuries or their duration, pain, or loss of future earning capacity.

The process of ascertaining the amount of compensation to be awarded for impairment of the capacity to work or to earn requires (1) the determination of the extent to which such capacity has been diminished, (2) the determination of the permanency of the decrease in earning capacity, and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth. 22 Am. Jur. 2d, Damages, § 93, p. 136. See, also, collection of cases in Annotation, 18 A. L. R. 3d 88.

Defendants rely on Schwab v. Allou Corp., 177 Neb. 342, 128 N. W. 2d 835, wherein the court stated: "Damages for a permanent injury may not be based on spec-

ulation, probabilities, or uncertainty but must be shown by competent evidence that such damage is reasonably certain as the proximate result of the pleaded injury. * * * the plaintiff did not prove permanent loss of earning power, although she did show permanent injury." In the Schwab case the plaintiff, a teacher, had a 10 to 15 per cent partial permanent disability from a fractured ankle. The medical expert could not relate this permanent disability to the plaintiff's work performance. The court said: "There is evidence that she had a partial permanent disability in the ankle that inconveniences her in climbing stairs and causes discomfort on those occasions, and in standing while teaching and in certain work on the playground with the students. Nothing is shown to indicate that she will not be able to earn the same salary in the future or to what extent her earning power would be diminished."

"In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom." Speedway Transp., Inc. v. DeTurk, 183 Neb. 629, 163 N. W. 2d 283.

The time for allowance of damages for loss of future earning capacity is at the time of trial. The injured party is not required to postpone her right to recover damages for her injuries until there is either full recovery, surgery, exhaustion of possible therapy, and treatment, although she may choose to do so. Defendants argue that the leg ache could be relieved if the cause was diagnosed and treated. Whether or not plaintiff used reasonable care to seek a cure and mitigate her damage was defendants' burden of proof; that was not made an issue here. See Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652.

In Schwab there was partial permanent disability but no evidence relating that disability to the work per-

formance of the injured party. Here there is medical evidence of permanent injury to the lip and that the pain in the leg would continue in the future, but no mathematical assessment in terms of permanence or duration; there is competent evidence of the injuries, the extent thereof, their duration, and their relation to the plaintiff's work performance. The evidence was sufficient for submission to the jury. See Kowalke v. Farmers Mutual Automobile Ins. Co., 3 Wis. 2d 389, 88 N. W. 2d 747. It is then for the jury to assess the damage. "The fact that the amount of damage may not be susceptible of exact proof or may be in a degree uncertain or difficult of ascertainment should not be a bar to any recovery." Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891. See, also, Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393.

Defendants contend that the court erred in giving instruction No. 15 which includes, in substance, the form of NJI Nos. 4.01, 4.02, 4.03, 4.04, 4.06, and 4.07, and that the court erred in giving instruction No. 16 which generally instructs the jury in computing future damages on account of plaintiff's injuries or loss of earning capacity. Considering these instructions, examined with all of the other instructions given, they do fairly and adequately inform and instruct the jury on the issues presented by the pleadings and the evidence.

The judgment of the trial court is supported by the evidence. There being no error in the proceedings, the judgment should be affirmed.

AFFIRMED.

SALLY ANN GYDESEN, APPELLANT, V. DUANE C. GYDESEN, APPELLEE.

198 N. W. 2d 67

Filed May 26, 1972. No. 38308.

1. **Divorce: Appeal and Error.** On appeal in an action for divorce the cause is tried de novo in this court.

2. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded.

Robert E. Paulick, for appellant.

Luebs, Tracy, Huebner & Dowding, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

CHADDERDON, District Judge.

This is a divorce action brought by Sally Ann Gydesen, hereinafter called "Sally" or "the plaintiff," versus Duane C. Gydesen, hereinafter called "Duane" or "the defendant."

A petition for divorce was filed by Sally on March 9, 1971. Duane filed an answer on April 16. On May 21 a trial was had, and at the close of the evidence the defendant moved for a dismissal. This motion was taken under advisement by the court until September 1 and the temporary custody of the minor children was given to Duane with Sally to pay child support of $15 per week.

On May 25, 1971, Sally filed a dismissal without prejudice, and on June 1 Sally filed a petition for divorce in Merrick County, Nebraska, which petition was dismissed by the court on motion of the defendant on June 25. On June 9 the court found that the dismissal without prejudice was to be treated as a motion to dismiss and the motion was overruled. The overruling of the dismissal was appealed to this court. This court dismissed the appeal on motion of the defendant on August 11.

On August 17, 1971, defendant asked leave to file a cross-petition. On August 26 the plaintiff filed a dismissal, or, in the alternative, asked permission of the court to dismiss her petition without prejudice. On Au-

gust 26 the court gave the defendant permission to file a cross-petition, and the motion for dismissal was overruled. A cross-petition was filed on August 31 and an answer thereto filed by the plaintiff on September 1. On the same day, evidence was introduced on the cross-petition of the defendant, with rebuttal evidence introduced by the plaintiff. The court granted the plaintiff an absolute divorce from the defendant, gave custody of the minor children to the defendant, and divided the property of the parties. From this decree the plaintiff has appealed.

In considering this question, this court has said in Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99: "The rule as to the character of the hearing to be had here is that on appeal to this court in a divorce action the cause is tried de novo."

Sally and Duane were married December 2, 1962, and have two children, Pamela Jean, born August 20, 1964, and Julie Ann, born June 8, 1967.

It would serve no useful purpose to set out the testimony in regard to the difficulties in this marriage. We think the evidence was sufficient for the trial court to grant Sally a divorce from Duane and that the division of the property was fair and equitable.

The plaintiff has set out six assignments of error but in her brief raises only two questions, which are: (1) Did the court abuse its discretion in awarding custody of the children to Duane? and (2) Did Sally have a right to dismiss her action without prejudice? We will discuss the second question first.

Section 25-601, R. R. S. 1943, provides: "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to a jury, or to the court where the trial is by the court, * * *."

In this case, in the trial on May 21, 1971, the plaintiff presented her case and rested, and the defendant moved for a dismissal of the plaintiff's petition. The

court took the matter under advisement until September 1. Certainly this was a submission of the case to the court and the plaintiff thereby lost her right to dismiss without prejudice. The trial court treated the two dismissals as a motion to dismiss and overruled both motions. This was within the discretion of the court and we do not think that this was an abuse of discretion.

The court found that both Sally and Duane were fit and proper parties to have custody of the minor children, but that since Duane had had a vasectomy and would be unable to have children in the future, he should have the custody of the children. There was testimony at the trial on May 21, 1971, that Sally intended to move to Wyoming, but in her rebuttal testimony on September 1 she testified that she intended to make her home in Grand Island.

There was further testimony that both Duane and Sally used the same babysitter for the minor girls, age 2 and 6, during working hours. It was necessary for Duane to take them to the babysitter at 6:30 a.m. in their nightclothes and they were put to bed by the babysitter until time for them to arise. Sally would take them to the babysitter about 8 or 8:30 a.m. which would allow the girls to get up at the normal time.

The testimony also brought out that Duane lived on an acreage a few miles from Grand Island and at night would play with the children and let them ride a horse he had purchased for that purpose, but there was no evidence that the girls had other children near their age to play with when they were in the custody of Duane.

The rule regarding custody of children laid down by this court is expressed in Bauer v. Bauer, 184 Neb. 777, 172 N. W. 2d 231: "In determining the question of who should have the care and custody of the children, this court has repeatedly said that as between the parties the paramount consideration is the best interest and welfare of the children. * * * Ordinarily the custody

of children of tender years should be awarded to the mother unless it is affirmatively demonstrated that she is unsuitable, unfit, or unable to provide a good home."

Since that rule was adopted, the Legislature in 1971 amended sections 42-310 and 42-311, R. R. S. 1943, to state in part: "No presumption shall exist that the mother of such children is more fit to take custody than the father." Since the passage of this legislation the court can only determine the best interests and welfare of the children as stated in Bauer v. Bauer, *supra*. We feel that the granting of the custody of the two girls to Duane because he had had a vasectomy is not considering the best interests and welfare of the children but that their best interests and welfare would be served by granting their custody to Sally since they would be able to live a more normal life.

The granting of the divorce to Sally and the division of the property is affirmed. The granting of the custody of the minor children is reversed. The cause is remanded, and the trial court is ordered to grant the custody of the minor children to Sally and to provide for support for the minor children by Duane. The trial court may make such order as it sees fit with regard to the removal of the children from the jurisdiction of that court. All other matters are affirmed. The costs of this action, including reasonable attorney fees for the plaintiff in the amount of $600, are taxed to the defendant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DORIS SWARTZ, APPELLEE, V. HESS, INC., APPELLANT.
198 N. W. 2d 64

Filed May 26, 1972. No. 38322.

1. **Workmen's Compensation: Appeal and Error: Evidence.** On appellate review of a workman's compensation case in the Su-

preme Court the cause will not be considered de novo unless the findings of fact are not supported by the evidence as disclosed by the record.

2. **Witnesses: Evidence: Trial.** The opinions of experts are not binding on a trier of facts.

Appeal from the district court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Swartz, Wieland, Eberly & Marolf, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Richard H. Williams, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

C. THOMAS WHITE, District Judge.

This is an appeal from the judgment of the district court finding that Edgar Swartz, hereinafter referred to as decedent, sustained an accident arising out of and in the course of his employment with the defendant Hess, Inc., and awarding compensation to his widow. The Workman's Compensation Court had found that the plaintiff had not met the burden of proof that the decedent's death was caused by accident and injuries resulting from his employment, and dismissed the action.

The facts are not in controversy. Decedent died on February 18, 1969. At the date of his death he was an employee of the defendant Hess, Inc., and had been so for a year and a half. His duties with Hess, Inc., were those of a delivery man for propane fuel to rural areas and towns in and about Fairbury, Nebraska. On the date of his death, decedent reported for work at about 7 a.m., his regular starting time. His schedule of deliveries was handed him. The morning deliveries were in Diller, Nebraska, approximately 15 miles east of Fairbury on a graveled road known as the PWF Road. Decedent returned from Diller at approximately 11 a.m., unloaded. He had lunch while Roy Hess, the

owner of Hess, Inc., reloaded his truck. Decedent left Fairbury shortly after 12:15 p.m. Roy Hess had placed a schedule in the decedent's truck while reloading, indicating further deliveries in Diller, Nebraska. At a point on the PWF Road from Fairbury to Diller approximately 8 ¾ miles east of Fairbury, the truck decedent was driving left the road, apparently in a gradual fashion, went into the ditch, traveled 169 feet and overturned, trapping the decedent in the cab of the truck. There was evidence of a washboard effect on the roadway 25 to 50 feet or more to the rear of the point where the truck left the road. The decedent was alive after the crash and spoke, requesting assistance in getting out of the smashed cab. When decedent was removed from the cab of the truck, Dr. Frank Falloon examined him in an ambulance at the Lynch Clinic in Fairbury at 2:05 p.m. and pronounced him dead, and determined that decedent had suffered a head injury, and appeared to have a broken right leg and a crushed chest. On the death certificate Dr. Falloon recorded the cause of death "as a skull injury secondary to a truck accident with intercranial injury and cardiovascular collapse, associated injuries with crushed injury to the chest."

Dr. Falloon further testified that the "most likely cause of the patient's demise" appeared to be a skull fracture.

Decedent had a long record of treatment for high blood pressure first diagnosed on October 12, 1964, complicated by an over-weight condition. The last visit to Dr. Falloon was on January 30, 1969. Blood pressure read 170 over 102, having been reduced from a previous visit on December 2, 1968, of 200 over 100 when decedent informed Dr. Falloon that he had been out of medication for several days. Dr. Falloon testified: "I would emphasize that from viewing the body postmortem the precipitating event * * * could only be speculative."

Dr. Monte M. Scott, a specialist in internal medicine, after reviewing the records and deposition of Dr. Falloon, and a review of the known physical facts of the accident, testified in response to a hypothetical question, in his opinion with reasonable medical certainty, the precipitating cause of decedent's truck leaving the road was a stroke, but also that, "I feel that the injuries . . . such as the right leg fracture could have been sufficient to produce cardiovascular collapse." He also stated on cross-examination that the cause may have been decedent going to sleep or daydreaming.

An autopsy was not performed. Whether a cardiovascular accident (stroke) occurred is not known. The only evidence with regard thereto is the expert testimony of Dr. Scott. If decedent had a stroke, it is not known when in the sequence of events it happened.

On an appellate review of a workman's compensation case, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285. The defendant urges that a compensation award cannot be based on speculative evidence, possibilities, or probabilities, and asserts as the reason for reversal of the award, the opinion based on reasonable medical certainty that the cause of the decedent's truck leaving the roadway was "a stroke or cardiovascular accident," and that assuming such prior stroke, the precipitating cause of the accident, injury, and death was such stroke and did not arise out of and in the course of employment.

The plaintiff urges that even if there were conclusive evidence that decedent suffered a stroke prior to his truck leaving the roadway, nevertheless the judgment must still be affirmed, and urges the adoption of the rule stated in the case of Tapp v. Tapp, 192 Tenn. 1, 236 S. W. 2d 977, which held that where a physical disturbance occurs (in that case an asthmatic attack

causing the driver to black out) suddenly, and contributes to cause an injury with another hazard (the dangers incident to driving) the injury is compensable. In the view we take of this case, it is not necessary to consider this contention.

A trier of fact is not required to take the opinions of experts as binding upon him. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151; NJI No. 1.42.

The trial court could properly find under the evidence that the accident arose out of the condition of the road, the driver sleeping or daydreaming, and was not required to accept as conclusive the opinion of a medical expert, as to an unrelated precipitating cause. There being evidence in the record to support the findings of the trial court, we affirm its judgment. Plaintiff's counsel will be allowed a fee of $1,000 for services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RALPH EDWARD LILLARD, APPELLANT.
198 N. W. 2d 184

Filed June 2, 1972. No. 38165.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Ralph Edward Lillard, pro se.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant entered a plea of guilty to a charge of possession of a forged instrument with intent to utter

and publish the same as genuine, and was given an indeterminate sentence of not less than 7 nor more than 10 years. The sole issue raised on appeal is the claim that the sentence is excessive.

Defendant was represented by counsel throughout the proceedings. The proceedings surrounding arraignment and plea adhered meticulously to standards and rules for the protection of the accused. A plea bargain made by the prosecution with defendant, which included a recommendation to the court of a sentence of not more than 10 years, was carefully adhered to by the prosecution. Sentence was imposed after a presentence investigation. The sentence authorized by statute is 1 to 20 years imprisonment and a fine. § 28-601, R. R. S. 1943. The record reveals no abuse of discretion by the trial court.

AFFIRMED.

ORVILLE J. DAHL, APPELLEE, V. MILTON J. ROBINSON, APPELLANT.
198 N. W. 2d 207

Filed June 2, 1972. No. 38241.

1. **Appeal and Error: Evidence: Verdicts.** In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. ———: ———: ———. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

D. Nick Caporale and Waldine H. Olson of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Homer E. Hurt, Jr., for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action for damages resulting from an automobile accident occurring at about 1:15 p.m., May 13, 1970, on a level, straight-away section of a paved, two-lane highway. It was misting and the highway was wet. Three cars, all traveling south, were involved. Verdict and judgment were entered for the plaintiff and that judgment is affirmed.

The evidence is disputed in some areas but is ample to warrant a jury finding the facts to be as follows: An automobile operated by Gary Glissman was in the lead, followed by plaintiff's car at a distance of 100 to 150 yards, and then by defendant's car which was 4 or 5 car lengths behind plaintiff. All were proceeding at about the same speed which was 45 to 55 miles per hour. Glissman saw two cars on the right shoulder of the highway and recognizing one, sought to turn off the pavement and stop. The jury could have found that he failed to signal a right turn and did, in fact, stop; also, that plaintiff stopped his car, was struck by defendant's car, and driven into the Glissman car.

The Glissman car sustained a badly crumpled left rear fender, and a bent trunk lid and rear bumper. The trunk lid and right rear fender of plaintiff's car were jammed forward over the rear wheels, the rear window broken, and it received major damage to the right front fender, grille, hood, and rear bumper. Also, four bolts holding the front seat were sheared off. Defendant's car had a badly bent front bumper, hood, grille, and left front fender. Defendant's car left skid-marks 90 feet in length.

At the time of the impact, the front seat having broken off, plaintiff was catapulted backwards with his head between the front and rear seats. A week elapsed

before he consulted a doctor and his medical expense was minimal, amounting to about $320.30 for both him and his wife. He was engaged in the business of selling livestock feeds and also operated a pick-up service hauling dead animals to a rendering plant. Both entail heavy lifting. Up to the time of trial, he had pain in his left arm, difficulty in lifting things, had to quit bowling and playing golf, could not sleep on his left side, had worn a back brace for about 8 months, and had been obliged to offer his rendering business for sale. He had his sons help with the lifting and also occasionally employed other help when the sons were in school. Damage to his car amounted to $300.

Defendant concedes his negligence was the proximate cause of the accident. His first contention is that the evidence fails to show plaintiff's injuries were proximately caused by the accident. Although the evidence on the point could be more specific, we are satisfied that evidence of his former activities, contrasting with their curtailment after the accident, the violence of the accident, the development of pain and physical difficulties soon after the accident of a nature not ordinarily encountered in the absence of a physical injury, and the absence of any evidence of other injuries or accidents required submission of the point to the jury.

Defendant states the verdict, for $10,000, is excessive. Medical and property damage amounted to about $620.30. No permanent or future damages were pleaded. Other elements in issue were inability to properly conduct and retain plaintiff's businesses, employment of additional help, and pain and suffering. We do not believe that the verdict is clearly erroneous. "In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

"A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law." Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548.

Defendant also insists that plaintiff's counsel was guilty of making an impermissible argument on rebuttal in that his statements were not properly rebuttal argument. The record fails to disclose the argument of plaintiff's counsel. In its absence, it is impossible for this court to determine what was or was not properly rebuttal argument.

The judgment of the district court is affirmed.

AFFIRMED.

BURTON RISTINE, APPELLEE, V. GEIGY AGRICULTURAL CHEMICALS, DIVISION OF GEIGY CHEMICAL CORPORATION, ET AL., APPELLANTS.

198 N. W. 2d 199

Filed June 2, 1972. No. 38264.

1. **Appeal and Error: Evidence: Verdicts.** In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and all conflicts resolved in his favor.
2. **Witnesses: Trial: Evidence.** Testimony by the plaintiff as to statements of the defendants' agent made to a third party and related to the plaintiff by the third party is admissible to show that the statements were related to the plaintiff and that he relied on them.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Raymond J. Connell and Stewart & Stewart, for appellants.

Beatty, Morgan & Vyhnalek, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

BOSLAUGH, J.

This is an action for damages for the loss of a corn crop. The jury returned a verdict for the plaintiff in the amount of $1,545. The defendants appeal.

The plaintiff farms near Gothenburg, Nebraska. The defendants manufacture and sell Atrazine, a chemical used for weed control. In 1965, the plaintiff applied Atrazine to part of a 60-acre field of corn. The plaintiff claimed the Atrazine destroyed the corn.

There was evidence from which the jury could find that Paul Bergman, an agent of the defendants, talked with Marvin Harms, an employee of the Gothenburg Co-op, early in 1965. Bergman told Harms he was interested in having some farmers apply Atrazine with starter fertilizer. Later Bergman left sample bags of Atrazine with Harms to be distributed to farmers who would apply it this way.

On or about May 4, 1965, the plaintiff talked with Harms about starter fertilizer. He mentioned that he had a weed problem and Harms told him that a representative of the defendants had left samples of Atrazine to be applied with starter fertilizer. The plaintiff purchased 45 pounds of Atrazine and Harms gave him two 5-pound bags of Atrazine. Harms told the plaintiff to mix the Atrazine with water and add it to liquid fertilizer in the pressure tanks on his lister.

The plaintiff followed the instructions given by Harms and applied the 55 pounds of Atrazine to 55 acres, leaving approximately 5 acres untreated. By the end of May it was apparent that the corn was damaged where Atrazine had been applied. The untreated corn appeared to be "real good." The plaintiff then notified Harms who in turn notified the defendants.

The plaintiff was allowed to testify over objection that Harms said Bergman had told Harms the Atrazine

was to be applied with starter fertilizer. Defendants claim the hearsay rule is applicable. The evidence was admissible to show that the statement had been made to the plaintiff and that he relied on it. The representations and reliance thereon were part of the facts to be proved. The hearsay rule was not applicable. See, VI Wigmore on Evidence, § 1766, p. 177, and § 1789, p. 235; McCormick on Evidence, § 228, p. 463. There was evidence in the record of Bergman's authority and evidence that Bergman should have expected and anticipated that his statements would be transmitted to the customer for the purpose of promoting the sale of Atrazine. Harms had testified previously as to his conversation with Bergman, and the plaintiff testified as to his conversation with Harms.

The defendants claimed, and there was evidence which tended to prove, that the Atrazine had been improperly applied in that it was sprayed directly on the seed with the fertilizer solution; that it was applied in excessive amounts; and that the plaintiff was negligent in failing to read the label on the containers. However, the plaintiff's evidence was that he applied the Atrazine in accordance with the instructions of the defendants as relayed to him by Harms. This conflict in the evidence presented a question for the jury. When considered in the light most favorable to the plaintiff, and all conflicts are resolved in his favor, the evidence is sufficient to sustain the verdict and judgment.

The defendants complain that the trial court failed to instruct on their theory of the case. Instruction No. 2 advised the jury that the defendants claimed the plaintiff was negligent and had failed to comply with the instructions and warnings printed on the container labels. Instruction No. 4 required the jury to find that the plaintiff had relied upon the representations of the defendants as to the application of Atrazine with starter fertilizer before a verdict could be returned for the plaintiff. The jury was further advised that if the plain-

tiff had negligently failed to follow the instructions on the label, that must be considered in accordance with the comparative negligence instruction. In the absence of a request for more detailed instructions, these instructions were adequate under the circumstances to state the defendants' theory of the case.

The parties stipulated that the plaintiff's damages were $2,006.70. The defendants claim that the verdict in the amount of $1,545 amounts to a finding that the plaintiff was guilty of negligence more than slight. A similar contention was considered and rejected in Burney v. Ehlers, 185 Neb. 51, 173 N. W. 2d 398.

The evidence disclosed that the corn was planted on rented land and that the landowner's share of the crop was 40 percent. The defendants contend that the verdict should have been reduced accordingly. The plaintiff testified that he had made a settlement with the landowner for the landowner's share of the loss. Under these circumstances the plaintiff was entitled to recover the entire damages. See, also, § 25-304, R. R. S. 1943; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151.

The judgment of the district court is affirmed.

AFFIRMED.

PETER KIEWIT SONS' CO., APPELLANT, V. HARTFORD FIRE INSURANCE COMPANY, A CORPORATION, APPELLEE.
198 N. W. 2d 193

Filed June 2, 1972. No. 38339.

Insurance: Contracts: Damages. An insurance policy insuring against all risks of direct physical loss covers damage caused by the failure of the boom clutch on a lifting crane unless otherwise excluded in the policy.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions.

D. Nick Caporale and Larry R. Forman of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Pilcher, Howard & Dustin, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action upon an equipment floater insurance policy issued by the defendant to the plaintiff. A 140-ton crane leased by the plaintiff from Rental Machinery Co., Inc., was damaged on March 18, 1968, when the boom clutch failed and allowed the boom to fall. The plaintiff claimed damages in the total amount of $40,854.70 subject to a deductible clause in the amount of $5,000.

The trial court found that the policy did not cover damage to the crane; that other damage did not exceed $5,000; and dismissed the action. The plaintiff appeals.

The policy insured all equipment owned or leased by the insured against "all risks of direct physical loss, damage or destruction." Wear and tear, gradual deterioration "or mechanical breakdown, but not the damage resulting therefrom" were excluded from the policy.

The evidence established that the adjustment between the cam rod and shoe in the boom clutch of the crane was not maintained because a jam nut had worked loose. As a result, the clearance between the shoe and the drum became too great and oil leaked from the hydraulic cylinder onto the drum. When the operator attempted to raise the boom, the clutch did not hold and allowed the boom to fall.

The defendant does not contend that the "mechanical breakdown" exclusion in the policy is applicable to the damages claimed by the plaintiff. The defendant does contend that the damage to the crane was not covered by the policy because the accident was caused by a

defect in the crane and the plaintiff was not obligated to repair the crane.

The lease between the plaintiff and Rental Machinery Co., Inc., required the plaintiff to keep the equipment in good repair and to return it in as good condition as when leased, reasonable wear and tear excepted. The evidence established the accident resulted from a failure to maintain the boom clutch in proper adjustment. Although there was evidence that in other litigation arising out of the same accident the plaintiff has claimed that the crane was defective, the evidence here was not sufficient to show any part of the mechanism was defective or improperly designed. The policy provides that the defendant is subrogated to any right of action of the plaintiff against third persons.

The plaintiff was entitled to judgment in the amount of $35,854.70. The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff in the amount of $35,854.70.

The plaintiff is allowed $2,000 for the services of his attorneys in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

PATRICIA L. JUNKER, APPELLEE, V. KENNETH JUNKER, APPELLANT.

198 N. W. 2d 189

Filed June 2, 1972. No. 38351.

1. **Divorce: Appeal and Error.** A divorce action is triable de novo upon the issues presented by the appeal.
2. **Divorce: Alimony: Property.** The division of property and allowance of alimony in divorce actions are always to be determined by the facts of each case.
3. ———: ———: ———. The rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property

involved, depending upon the facts and circumstances of the particular case.

4. **Attorneys at Law: Fees.** A reasonable attorney's fee is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorney.
5. ———: ———. In determining the fairness of an award for an attorney's fee, consideration may be given to the provisions of the Nebraska State Bar Association Minimum Fee Advisory Schedule.
6. **Attorneys at Law: Fees: Courts.** While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive or insufficient.

Appeal from the district court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed as modified.

W. O. Baldwin and Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

Joseph F. Chilen and Dalke, Carlson & Thompson, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

BRODKEY, District Judge.

This is an action for divorce, instituted in the district court for Jefferson County, by Patricia L. Junker, plaintiff and appellee, hereinafter referred to as plaintiff, against Kenneth Junker, defendant and appellant, hereinafter referred to as defendant. In its decree, the trial court found for the plaintiff on her petition and against the defendant on his cross-petition, and granted the plaintiff a divorce. The decree also adjudicated the rights of the parties with regard to a division of the property and awarded the plaintiff permanent alimony. Defendant has appealed to this court; but the granting

of the divorce is not assigned as error in the appeal, and both parties concede that ample evidence existed for the granting of the divorce to the plaintiff. The assignments of error by the defendant are directed to a claim of excessiveness of plaintiff's award in the division of the property of the parties, the amount of the allowance of permanent alimony, and the allowance of an excessive attorney's fee to plaintiff. Our court has held that a divorce action is triable de novo upon the issues presented by the appeal. Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1.

The parties to this action were married on November 25, 1961. Each of the parties had been previously married and each of them had a daughter by a former marriage. At the time of trial, plaintiff was 42 years of age, and defendant was 34 years of age. During the marriage, the defendant was employed as a car salesman and his income was based upon a salary; and, commencing in 1968, he also became a participant in a profit-sharing bonus plan, which was based upon the net operating profit of the dealership as computed at the end of the year. Total compensation paid to the defendant in 1969 amounted to $15,000.94, which included a bonus of $4,950. In 1970, his compensation amounted to $15,456.84 which included a bonus in the amount of $5,450. At the trial, his employer testified to the high quality of defendant's competence and ability as an executive of his company.

During the same period plaintiff had been variously employed in a florist shop and at the Fairbury Plumbing & Supply Company, and her anunal income varied between $2,700 per year and $3,600 per year; but at the time of the divorce she was unemployed, and lack of essential skills and training have handicapped her in her efforts to obtain employment. Evidence is somewhat contradictory as to the health of the respective parties, each claiming ill health in certain particulars. At the time of her marriage to the defendant, plaintiff

possessed various items of furniture and personal property together with the sum of $4,000 in cash, which she invested in the first home of the parties purchased after their marriage in the City of Fairbury. This home was later sold and the proceeds invested in a new home owned by the parties at the time of the trial. The evidence also shows that the defendant invested $3,000 in cash in the new home, and has made the payments on the mortgage on this home and paid the taxes for same since its acquisition. At the time of their marriage, the defendant possessed certain boats, an automobile, a limited amount of stock, and a modest bank account, together with guns and boating equipment. Since their marriage, the parties have acquired some additional household goods, furniture, and recreational equipment. In its decree entered in this case on July 29, 1971, and as later modified for the purpose of clarity on September 28, 1971, the trial court awarded to the plaintiff the residence of the parties, subject to the existing mortgage thereon, the household goods and furnishings with certain exceptions which it awarded to the defendant, an electric eye attachment for the garage, and a 1962 Oldsmobile, including an insurance claim for damage thereto. The court also awarded the plaintiff alimony totaling $9,000, payable at the rate of $150 per month, commencing August 1, 1971; and also awarded plaintiff an attorney's fee for her attorney in the amount of $1,000 in addition to the temporary attorney's fee of $75 previously allowed. The court awarded the defendant a house trailer and contents, boats, trailers, and boating equipment, camping equipment, his guns and related equipment, his hand and power tools, his stocks, bonds, and bank accounts, the policies of insurance, a 1957 Chevrolet station wagon, and other personal effects in his possession.

Evidence in the record supports the following values of the property involved herein as of the date of the trial. The original purchase price of the home of the

parties was $21,500 and certain improvements were made to the property after its acquisition. One real estate appraiser testified at the trial that the fair market value of the property in question was $26,500 and another appraiser gave its value as $23,500. We accept the median of these two figures and find that the value of the property at the time of the trial was $25,000. There was an outstanding mortgage indebtedness on the home at the time of the trial in the amount of $8,102.75, the defendant having reduced the balance of the mortgage by approximately $900 after the filing of the suit for divorce. In any event, it appears that the equity in the home at that time was $16,897.25. The plaintiff was also awarded the household goods, furnishings, and equipment in the home, which were variously estimated to be from $2,200 to $3,142. For the purposes of this case we have also adopted the median figure of $2,671 as the value of such furniture and equipment. The electric eye for the garage was valued at $150, and the Oldsmobile automobile, including the insurance claim for damages, was valued at $850. The total value of the property awarded plaintiff by the above figures was $20,568.25. With regard to the value of the property awarded to the defendant, evidence in the record substantiates a value of $1,500 on the house trailer and contents, $4,350 on the boats and trailers, $50 for sonar equipment, $200 for camping equipment, $1,233 for guns and equipment, $150 for hand and power tools, $50 for a Walkie-Talkie, $500 in value of stocks, $220 in value of government bonds, $225 in bank accounts, $450 for a 1957 Chevrolet station wagon, and $1,600 for the cash value of an insurance policy, or a total value of property awarded the defendant of $10,528. From the above figures, it appears the plaintiff was awarded approximately sixty-six percent of the total estate, and the defendant thirty-four percent. When we add to this the award of permanent alimony to the plaintiff of $9,000, the disparity becomes even more

pronounced. Keeping in mind the duration of the marriage of the parties of less than 10 years, the fact that no children were born of the marriage, and the additional fact that the evidence discloses the plaintiff was not without fault contributing to the dissolution of the marriage, this court is of the opinion that the award of the trial court was excessive and must be modified.

Factors to be considered in the division of property in a divorce case have been stated by this court in numerous opinions and need not be restated here. See, for example, Sanchez v. Sanchez, 186 Neb. 427, 183 N. W. 2d 743; Fry v. Fry, 186 Neb. 521, 184 N. W. 2d 636; Neeman v. Neeman, 183 Neb. 105, 158 N. W. 2d 236.

In Reckling v. Reckling, 172 Neb. 731, 111 N. W. 2d 627, this court stated: "The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case."

The rule for determining alimony or the division of property in a divorce action provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case. Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430; Loukota v. Loukota, 177 Neb. 355, 128 N. W. 2d 809; Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1.

In view of what we have stated above, we are of the opinion that the equity in the home of the parties awarded to the plaintiff by the decree of the trial court should be divided equally between the parties, and that the amount awarded to plaintiff as alimony should be reduced. We have heretofore found that the value of the home awarded to plaintiff was $25,000 and was subject to a mortgage balance of $8,102.75, and that the equity awarded to plaintiff was in the amount of $16,897.25 as of the date of the trial. We therefore determine that the plaintiff shall have the right for 30 days from the

issuance of the mandate herein to purchase defendant's equity and interest in said real property for $8,448.63, the plaintiff to assume or pay off the balance of the mortgage indebtedness, with adjustment to be made for any payments made on the mortgage since the date of the decree. If the plaintiff fails to exercise the option within that period, the defendant shall have the right for 30 days thereafter to purchase the plaintiff's interest on the same terms. If neither party exercises the option to purchase, unless the parties agree otherwise, the real property shall be sold at public auction and the net proceeds divided equally between the parties. We also modify the provisions of the decree in this case awarding the plaintiff alimony in the sum of $150 a month, commencing August 1, 1971, and continuing monthly to July 1, 1976, or a period of 60 months. We determine that the amount of the monthly payments should be reduced to $100 a month for said 60 month period or a total of $6,000, with adjustment to be made for excess in the amount of payments made to date.

Defendant also assigns as error in this case the award by the trial court of an attorney's fee to plaintiff's attorney, in the sum of $1,000, which defendant claims was excessive. It is difficult, if not impossible, to determine the amount of an attorney's fee in a divorce action such as this by "color matching" fees allowed in other cases solely on the basis of the amount of property involved. The amount of an award of an attorney's fee is largely within the discretion of the trial court. A reasonable attorney's fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned. Fotinos v. Fotinos, 184 Neb. 486, 168 N. W. 2d 698; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508. The transcript in this case reveals that the attorneys for

the plaintiff in addition to participating in the trial itself, which lasted 2 days with 9 witnesses being called for plaintiff, also devoted a great amount of time and effort in the drafting of pleadings and lengthy interrogatories. They attended and participated in numerous court proceedings, including hearings for temporary allowances, and for a restraiinng order; also hearings in resistance to defendant's application for specific property, arguments on defendant's demurrer and motion to make more definite and certain, and a hearing for modification of the final decree; a motion for a new trial; and, presumably, a motion for temporary allowances pending the appeal to this court. In determining the fairness of an award for an attorney's fee in a case such as this, reference may properly be made to the Nebraska State Bar Association Minimum Fee Advisory Schedule adopted in 1970. Moreover, in Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390, this court stated: " 'While trial courts and appellate courts equally are regarded as experts on the value of legal services, * * * a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive or insufficient, * * *.' " In this case we feel the trial court was in a better position to appraise the situation and we have concluded that the award for attorney's fees made to plaintiff in this case was not unreasonable or excessive. Plaintiff is awarded the sum of $250 for the services of her attorneys in this court.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ORVILLE KING, APPELLANT.
198 N. W. 2d 185

Filed June 2, 1972. No. 38396.

1. **Mental Health: Criminal Law.** The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others.
2. ———: ———. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Hamilton, Geier & German, for appellant.

Paul L. Douglas and William D. Blue, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The appellant, Orville King, was committed to the Lincoln State Hospital at Lincoln, Nebraska, on December 16, 1955, as a sexual psychopath. On August 17, 1970, a report and recommendation signed by the director of the hospital was filed in the district court. The report stated that the appellant had been given a complete psychiatric evaluation, as provided in section 29-2906, R. S. Supp., 1969, and recommended that the appellant "be discharged from commitment as a sexual psychopath conditioned on his being committed by the Lancaster County Mental Health Board * * *."

On February 10, 1971, an evidentiary hearing was had on the report and recommendation. The appellant was represented by counsel at the hearing. The trial court found that the conditional release and commitment recommended by the director was not authorized by the statute and that the appellant should not be released. The appellant has appealed from this order.

The statute contemplates the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. State v. Noll, 171 Neb. 831, 108 N. W. 2d 108. The right of discharge rests within the sound discretion of the district court, and the recommendation of the superintendent is only evidentiary. If the district court concurs in the recommendation of the superintendent, the person committed may be released without restriction or released on probation. § 29-2906, R. S. Supp., 1969; State v. Noll, *supra*.

The evidence before the district court consisted of the testimony of Dr. Anderson, the Director of the Lincoln Regional Center. Dr. Anderson testified the appellant was a sexual psychopathic personality; he did not now meet the criteria of a sexual psychopath but was not cured as a sexual psychopath; his power to control his sexual impulses was impaired, but he did not have an "utter lack of power" to control his impulses; and the appellant was not competent enough to be released from the hospital and should not be released "for a rather long time."

Dr. Anderson's testimony disclosed there has been improvement in the appellant's condition since his commitment in 1955, but the appellant should not be released from the hospital at this time. Dr. Anderson felt it would be desirable if the appellant could be treated as on ordinary patient at the hospital and suggested the possibility of vocational rehabilitation treatment.

As we view the record, the evidence before the district court sustains a finding that the appellant should not be discharged from his commitment as a sexual psychopath at this time. The record does not show an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANNIE E. WILLIAMS, APPELLANT.

198 N. W. 2d 187

Filed June 2, 1972. No. 38397.

Criminal Law: Embezzlement: Public Officers and Employees: Words and Phrases. The crime of embezzlement of public money as defined by section 28-543, R. R. S. 1943, applies only to officers or persons who are charged by law with the performance of the duties therein mentioned, and a police patrolman collecting coins from parking meters as part of the duties designated by his superior cannot properly be informed against thereunder.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and dismissed.

Robert E. Paulick, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Defendant was charged, tried, and convicted of embezzlement under the provisions of section 28-543, R. R. S. 1943. Several assignments of error are made but they all relate to the question of whether or not the defendant is one of the class of persons within the purview of the above section of the statutes. The information charges the embezzlement was committed by the defendant "while charged with the collection, receipt, safekeeping and transfer of public money." The evidence shows the defendant was at the times pertinent herein a member of the police department of the city of Grand Island and that he had been assigned by his superior officer to the duty of collecting coins from parking meters. The evidence was clearly sufficient to support the finding made by the jury that he converted $74.58 to his own use.

The defendant's position is that section 28-543, R. R. S. 1943, pertains only to persons "charged by law" with the collection, receipt, safekeeping, transfer, or disbursement of the public money, and that he was not "charged by law" with such duties and therefore is not within the class of persons contemplated by this particular statute on embezzlement. We find the defendant's position is well taken, and the judgment of conviction must be reversed and the information dismissed.

This is not an area in which the law is obscure or difficult. It has long been clear that section 28-543, R. R. S. 1943, pertains only to persons upon whom *the law* has placed the duty of "collection, receipt, safekeeping, transfer or disbursement of the public money." This has been abundantly clear since at least 1942 when this court announced its decision in State v. Boatman, 142 Neb. 589, 7 N. W. 2d 159, 144 A. L. R. 585. In that case it was held that an employee in the office of the county clerk did not come within the statute although the county clerk would come within the statute. In that case this court analyzed the statute, the Ohio statute from which it was adapted, and the decisions of that state thereunder, and very clearly pointed out in what cases section 28-543, R. R. S. 1943, applies, citing State v. Meyers, 56 Ohio St. 340, 47 N. E. 138. We will not reiterate here this court's analysis but refer the reader to the opinion in the Boatman case.

We add, however, the following comments. The Nebraska Legislature has enacted several statutes on embezzlement, to wit, sections 28-538, 28-539, 28-540, 28-542, 28-543, 28-544, 28-545, 28-546, 28-547, and 28-548, R. R. S. 1943. Each defines a separate crime of embezzlement usually dependent upon one or more of the following factors: The person or organization from whom or from which the property is embezzled; the class of persons to which the person who does the embezzlement belongs; and in some cases upon what is embezzled. In addition, in some statutes certain acts

give rise to presumptive evidence, which presumptions do not exist under other statutes, and under some statutes felonious intent is an element of the crime and in others it is not. In short, there are significant differences in what must be charged and proved in each case. We set forth just a few of the specific differences. Under section 28-543, R. R. S. 1943, under which the defendant was charged, fraudulent intent is not an essential element of the offense. Haines v. State, 170 Neb. 304, 102 N. W. 2d 609. Under that same section the refusal of the person "to pay any draft, order or warrant which may be drawn upon him by the proper officer" is prima facie evidence of embezzlement. Under section 28-538, R. R. S. 1943, felonious intent is essential. Hamilton v. State, 46 Neb. 284, 64 N. W. 965; State v. Culver, 5 Neb. (Unoff.) 238, 97 N. W. 1015. Under section 28-540, R. R. S. 1943, the state must prove that a bailment existed. Yost v. State, 149 Neb. 584, 31 N. W. 2d 538. Under some of the embezzlement statutes different measures of punishment are applicable. This is true of section 28-543, R. R. S. 1943, where the possible term of imprisonment is 1 to 21 years and a monetary fine in the form of a judgment for twice the amount embezzled.

The State in its brief argues, citing an Indiana case: "It would be unthinkable to hold that only officers charged by law with the collection . . . could be guilty of embezzling public funds." It would be at least surprising if true. However, the evidence clearly would have supported a conviction under section 28-538, R. R. S. 1943, which applies among others to "employees" of any employer and "money . . . belonging to any other persons, body politic or corporate." It is the clear responsibility of prosecutors to examine the evidence, the statutes, and the cases and to make a proper determination of the charge which the evidence will support.

REVERSED AND DISMISSED.

BARKALOW BROS. COMPANY, APPELLANT, V. FLOOR-BRITE, INC., APPELLEE.
198 N. W. 2d 329

Filed June 9, 1972. No. 38232.

1. **Trial: Evidence.** In every case, before the evidence is submitted to the jury, there is the preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. **Employer and Employee: Agents: Negligence.** An employer is not liable for the negligence of one whom his employee procures or permits to assist in the work without proof that the employee had authority from the employer to procure or permit the assistance.
3. ———: ———: ———. Where there has been a continuous or customary use of an assistant by the employee, and the employer has known of this practice and acquiesced in it, the employer is liable for the negligence of the assistant as though actually employed by himself.
4. **Trial: Witnesses: Evidence.** While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it.
5. **Trial: Evidence: Verdicts.** Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.
6. **Trial: Evidence.** Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another.
7. ———: ———. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference.
8. **Trial: Evidence: Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Haney, Wintroub & Haney, for appellant.

Emil F. Sodoro, Richard P. Jeffries, and Ronald H. Stave, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

WARREN, District Judge.

This is an action brought by plaintiff Barkalow Bros. Company to recover damages resulting from a fire, occurring in plaintiff's Omaha business building on November 20, 1965, and allegedly caused by the negligence of the defendant Floor-Brite, Inc., which was then providing janitorial services for the plaintiff under contract.

At the close of all of the evidence, the defendant's motion for directed verdict was sustained and plaintiff's petition was dismissed. Plaintiff contends that the trial court erred in thus failing to submit the question of defendant's negligence to the jury.

Plaintiff's evidence established that defendant had assigned one employee, James Boeckman, Sr., the responsibility for 5-day-a-week cleaning of the first floor office area and a portion of the basement of plaintiff's building; and that Boeckman, accompanied by his two sons, James (Jim) Boeckman, Jr., then 11 years of age, and Daniel Boeckman, then 13, arrived at the building at about 5 p.m. on the day of the fire, a Saturday. Auditors had been working in the otherwise unoccupied building earlier in the day, but it is not clear from the evidence whether they were in the building during the cleaning process. The two sons aided Boeckman in his customary cleaning duties, which included emptying waste baskets and ash trays, dusting furniture, sweeping floors, and mopping lavatories. A fabric collector bag on a steel frame was wheeled about and used by Daniel as a receptacle into which he emptied both waste-

baskets and ash trays from about 15 desks. Daniel testified that he examined the contents of each ashtray to see whether any cigarette or cigar stubs were still lighted before dumping the contents into the collector bag, and on completion of the rounds emptied the contents of the collector bag into steel waste barrels, located inside the ground floor garage. The empty collector bag was then moved to the basement, where the area immediately surrounding the storage room was swept and about a half cup of dust was placed in the collector bag, which was then folded on its collapsible frame and stored immediately to the right of the door, in a storage room under the basement stairway. The sole evidence relating to pipe smoking in the building was the almost casual testimony of Boeckman, Sr., that he lit his pipe "just before we quit."

Jim testified that right after dumping the dust sweepings into the collector bag and before pushing it into its storage room he told his brother Daniel that he smelled smoke, but Daniel replied that it was just the dust that they had picked up. No smoke was seen, and no further investigation was made. Boeckman, Sr., did not hear the conversation or learn of the incident that day. Boeckman, Sr., then finished cleaning the lavoratories, placed a mop and bucket in the storage room, noticed nothing unusual, and left with his two sons at approximately 6 p.m. A fire alarm was turned in at 8:24 p.m. The Omaha fire department captain who led the first company to the fire testified that the flames were coming from the enclosed storage area under the basement stairs at about the third step up from the bottom landing, which would have been in the south portion of the storage area. The storage room was approximately 17 feet long, with the entrance door opening west at the extreme north end, and the bottom landing at the south end.

Plaintiff's theory of negligence, relying entirely on circumstantial evidence, is that the fire was caused by

the negligence of defendant's employee and his two sons in somehow placing a lighted cigarette, cigar stub, or burning pipe ashes in the collector bag, and leaving them in that receptacle to start the fire when they left the building. Defendant contends that to so find, a jury would have to rest one inference upon another, one presumption upon another.

In every case, before the evidence is submitted to the jury, there is the preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

Before the court can apply this rule to the facts, there are two preliminary issues relating to evidence which the court must decide.

First, defendant contends that it is not liable for the negligence, if any, of the two Boeckman sons, because they were not employees of the defendant, and because their employee Boeckman, Sr., had no authority to procure or permit such assistance.

The basic proposition set forth in an extended annotation at 25 A. L. R. 2d 984, is a follows: "An employer is not liable for negligence of one whom his employee procures or permits to assist in the work without proof that the employee had authority from the employer to procure or permit the assistance."

A well recognized exception to that rule is also annotated. "Where there has been a continuous or customary use of an assistant by the employee, and the employer has known of this practice and acquiesced in it, the employer is liable for the negligence of the assistant as though actually employed by himself." 25 A. L. R. 2d 984 at 991. See, also, 57 C. J. S., Master and Servant, § 564a, p. 280.

This court has similarly ruled, although stating the

exception in terms of "implied authority" rather than in terms of "acquiesence." Levin v. City of Omaha, 102 Neb. 328, 167 N. W. 214 (1918).

It is undisputed in the record that the defendant's employee Boeckman, Sr., was paid on a per job basis for each building he cleaned, and had frequently utilized the assistance of one or both of his sons in cleaning plaintiff's building during the 5 months of his employment prior to the fire. The question then presented by the record is whether the defendant through its officers knew of the practice of Boeckman, Sr., in utilizing family help and had acquiesced in that practice.

Without detailing the evidence, the record demonstrates by the testimony of defendant's president, its vice president, and its office manager, that prior to the fire the practice of using family assistance was widespread among the defendant's 475 cleaning employees, that the supervisor of Boeckman, Sr., had to be aware of the practice because he visited the job site on a day-to-day basis, that there was no company policy prohibiting the use of family help, that the policy of paying the employee by the job rather than by the hour did in fact encourage such practice, and that after the fire in question and the realization that the actions of the Boeckman sons might create company liability, a strict rule prohibiting such activity was adopted and enforced by the defendant company. We think the evidence comes squarely within the exception stated above, and the rule most recently stated as follows: An employer is liable for negligence of an assistant where the employer has knowledge of customary and continuous use of an assistant by an employee. Mahan v. Litton (Ky. App.), 321 S. W. 2d 243. The acquiescence of defendant in the use of family assistants by its cleaning employees was well established by the record, and without finding that the Boeckman sons were negligent, we hold that their acts or omissions were those of the defendant under the doctrine of respondeat superior.

Second, we must consider plaintiff's contention that the trial court erred in refusing to allow expert testimony as to the cause of the fire. Plaintiff's first expert, captain George Hamann, properly testified as to the place where the fire originated, based upon his observations during the fire-fighting and on his post-fire inspection of the damaged basement. Following this, the witness was given a voluminous hypothetical question and asked to state his opinion "as to the cause or origin of the fire?" In several attempts to answer, the witness responded: "Careless smoking. Like dumping—might be something lit in the ashtray. The man was supposed to have been smoking a pipe. He dumped his ashes some place. The man was smoking—a pipe. That is it, then." On defendant's motion, the answers were stricken, and we think properly so. "While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it." Caves v. Barnes, 178 Neb. 103, 132 N. W. 2d 310. It is evident from the nature of the question and the answers given that the purpose of the hypothetical question was to elicit an opinion as to whom was to blame for starting the fire, and not as to the physical cause of the combustion.

The hypothetical question, as posed, was an indirect attempt to get an expert opinion as to the ultimate fact, the determination of which is the sole province of the jury. Plaintiff makes the same complaint with regard to the court's refusal to allow its second expert, Daniel Mulcahey, to answer the same hypothetical question. The question asked was for the same ultimate conclusion as that asked of captain Hamann, and was objectionable for the same reason. It was within the trial court's discretion whether to allow the expert witnesses to answer the hypothetical question, and its ruling will not ordinarily be disturbed on appeal unless there is a clear showing of abuse. Trial courts have broad discretion

in the general conduct of a trial, and we do not believe it was abused in this instance.

Plaintiff maintains that there is a reasonable inference the fire started from a lighted cigarette or cigar butt dumped into the collector bag. No evidence exists that a burning cigarette or cigar was in an ash tray at the Barkalow Bros. building during cleanup on the day in question, or that any burning tobacco product was dumped into the collector bag. On the contrary, plaintiff, itself, adduced proof by the testimony of Daniel Boeckman that he had examined the contents of each ash tray by looking at it and found no cigarettes or cigars that were lighted. Second, plaintiff infers that a burning cigarette or cigar butt was not emptied out, but remained in the collector bag when it was folded and stored away. The evidence of plaintiff directly contradicts such a further inference, in that the testimony was that Daniel Boeckman dumped the first floor accumulation of wastepaper and ash tray contents from his collector bag into a metal waste barrel inside the garage, before proceeding to the basement with the collector bag. Admittedly, there was no fire in the garage where the steel barrels were located. The practice was to take the collector bag off the frame, hold it upside down over the barrel and shake it to empty its contents. There is absolutely no evidence that a lighted cigarette or cigar (of which there is no evidence) stayed in the collector bag after it was emptied. The final necessary inference is that the fire was started within the collector bag and then spread to the building itself. The evidence that the fire in question began in the basement area where the collector bag was stored can hardly give rise to a presumption or inference that there was any relationship between the two. The evidence showed storage of many flammable items in the 17-foot-long room under the stairway, as well as the presence of plaintiff's junk items which had collected therein over many years. The plaintiff's evidence was

that the folded collector bag was placed immediately inside the door to the storage room and to the right, which would have placed it underneath the upper stairs of the staircase. There is no evidence that the collector bag was pushed far enough back in the storage room to proximate the third step. The storage room area contained a pull-chain type of electric light, wiring thereto, a steam pipe running through it, and wooden beams, shelving, and wainscoating, all in a 60-year-old building. The storage room door was closed but not locked. The only restrooms in the building were located in the basement in near proximity to the storage room, and restroom supplies were stored therein. The areas of speculation as to the cause of the fire might well run the gamut from defective wiring to spontaneous combustion to arson to negligence of a third person entirely unconnected with defendant. The smelling of smoke by James Boeckman, Jr., was unexplained, but he and his brother quickly determined he was mistaken and nothing more transpired in that respect. The reasonableness of the actions of the Boeckman sons, at the time one thought he smelled smoke and the other instantly denied its existence, must be judged as of that moment in the light of what they then knew, and not in the light of the fact that a fire was reported in that basement 2½ hours later. There is no evidence that anything else unusual or suspicious occurred from that time to the time the Boeckmans left the building. The evidence demonstrates that the sons worked under their father's immediate supervision and did their cleaning duties exactly as he directed and in a reasonable manner.

Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reason-

ably be drawn therefrom. Or, to phrase it differently, the evidence must be sufficient to make the theory of causation reasonable and not merely possible. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another. Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52.

Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged. R & S Corp. v. Barnes, 182 Neb. 431, 155 N. W. 2d 379.

In view of the foregoing, we find that the evidence of negligence on the part of the defendant is too conjectural and speculative to require a reversal of this cause. The judgment of the trial court dismissing plaintiff's petition pursuant to a motion for directed verdict is affirmed.

AFFIRMED.

RUTH D. SCRIPTER, APPELLANT, V. JOSEPH M. SCRIPTER, APPELLEE.

198 N. W. 2d 201

Filed June 9, 1972. No. 38268.

1. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Appeal and Error: Evidence.** The discretion of the lower court with respect to awarding the custody of minor children is subject to review, but the deter-

mination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

3. **Divorce: Equity: Appeal and Error: Evidence: Witnesses.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Thomas L. Anderson, for appellant.

Luebs, Tracy, Huebner & Dowding, James A. Beltzer, and D. Steven Leininger, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

STUART, District Judge.

The plaintiff, Ruth D. Scripter, appeals from a decree divorcing her from the defendant, Joseph M. Scripter. The two assignments of error briefed and argued relate to granting defendant custody of the minor child of the parties and to the division of the property of the parties.

The parties were married in July 1951, and have one daughter, Shawn Marie, born February 12, 1967. At the time of the divorce, plaintiff was 38 years old and defendant was 44 years old. The trial court awarded the custody of the minor child to the defendant. The evidence showed that the plaintiff suffers from rheumatism and arthritis in her left knee and spine, and calcium deposits in her lower back. She was hospitalized for an undisclosed reason for a period of 10 days shortly before the trial. She had previously done baby sitting, but testified that she was physically unable to perform baby sitting or to take care of children, and that she had been advised by her doctor not to perform any

work and to stay off her feet as much as possible. In addition, the evidence showed a continuous state of untidiness in plaintiff's home, either through plaintiff's physical incapacity or for other reasons. In contrast defendant is healthy, is regularly employed, and appears energetic and resourceful.

"In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children." Phillips v. Phillips, *ante* p. 89, 195 N. W. 2d 160.

This court, in the case of Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647, citing Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667, stated: " 'We have, of course, given weight to the findings and judgment of the trial court. The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining the best interests of children in custody proceedings.' We have further recently said in Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544, with reference to the scope of judicial review of custody orders by this court as follows: 'The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.' "

In reviewing the cold record before us, we can not see that there has been an abuse of discretion. The decree of the trial court awarding custody to the father is correct and is supported by the weight of the evidence.

All of the property of the parties has been accumulated by them since the date of the marriage. Plaintiff

inherited between $7,000 and $8,000 at the death of her father in 1964 or 1965. The defendant received a workmen's compensation settlement of $6,000 in 1965. At the time of the divorce the parties owned property having a net value of approximately $20,000. The trial court awarded the plaintiff a 1966 Chevrolet Caprice automobile, a residence at 933 South Eddy Street in Grand Island which was purchased in 1964 for $8,000 and is now rented for $100 per month, two cemetery lots worth $200, and the household goods now in her possession. Although the value of the various goods is not set forth in the evidence, it would appear that the trial court awarded plaintiff slightly more than one-half of the total net holdings of the parties.

Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. See Keenan v. Keenan, 187 Neb. 686, 193 N. W. 2d 568.

We are unable to find any abuse of discretion on the part of the trial court and on trial de novo find that a fair and just division of the assets was made by the trial court. No error appearing in this record, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DWIGHT M. WEST, APPELLANT.
198 N. W. 2d 204

Filed June 9, 1972. No. 38271.

1. **Sentences: Appeal and Error: Courts: Criminal Law.** This court may reduce a sentence when in its opinion the sentence is ex-

cessive. In such case the court is under a duty to render such sentence as the evidence warrants.

2. **Criminal Law: Trial.** Anomie in the criminal process is a variable not to be forgotten, although its weight is light in any one case.
3. **Criminal Law: Sentences: Evidence.** A sentence dictated by inordinate emotion is suspect. It is only by coincidence that it finds support in the evidence.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin and Robert Paulick, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Dwight M. West pleaded guilty to a charge of injuring property, causing damage in excess of $100. The district court sentenced him to imprisonment for an indeterminate period of 1 to 2 years. Dwight appeals. He assigns excessiveness of the sentence for error.

Dwight, age 19, hurled a bottle through the window of a jewelry store. The offense was premeditated in the sense that Dwight did not act on the spur of the moment. He held a grudge against the "establishment because of the way they involved me and my (older) brothers." Brothers "Doug" and "Dan," as well as Dwight, had been arrested for burglary; and "Dave," for making a "false" telephone call. At the time of the offense Dwight was free on bond on the burglary charge.

Dwight was single, living with his mother and three younger siblings. He contributed $20 to $30 a month irregularly to their support. His mother was gainfully employed and was paid Social Security benefits. His employment on a construction project ended in July 1971, upon completion of the project.

Dwight had been graduated from high school. He was to be matriculated in Hastings Technical College in September 1971 for a 2-year course in data processing.

Prior offenses committed by Dwight were 3 traffic violations, petty larceny 1 ½ years earlier, and receiving stolen property 5 months earlier. Questioned concerning prior alleged acts of vandalism and larceny, Dwight unequivocally denied participation.

Hearings were held on February 26, May 7, May 17, and July 28, 1971. Dwight withdrew a plea of not guilty and pleaded guilty on May 17. His former counsel, Lloyd Kelly, Sr., had withdrawn on May 7.

At the May 7 hearing Kelly said: ". . . he's charged in breaking something a little over $100. He thought it was a little less." Dwight volunteered, "Sir it was only $109." He also said that he had obtained an estimate from the Watton Glass Company. Counsel for the State said that the window damage was $109.96. Restitution in full had been made prior to the hearing on February 26. The amount, $200, included $109 for the window, $50 which was the retail price of a wooden replica of a boat with a damaged stern and a chip, $25 "bonus," and something for damage to the burglar alarm system. The amount was paid by Dwight's mother for him.

At the sentencing hearing on July 28, Dwight testified as follows: "Q. Do you recall the last time you were in this court with Mr. Kelly? A. Yes, sir. Q. You had a receipt with you, did you not? A. Yes, sir; I did. Q. Did you at that time advise the court that the damages were less than $100? A. Yes, sir. That receipt—that wasn't a receipt, it was an estimate. Mr. Kelly advised me to go to Watton Glass Company to get an estimate, which I did. I took the measurement of the Brodkey window. I got an estimate of $69. . . . Q. However, you did not advise the court of the additional damages you paid? A. The additional—the

damages the court had me charged with was the window. I paid for the window. The other payments I made was bonus."

During the cross-examination the court intervened: "What you are saying, Mr. Kelly told you to show the court the $67 bill? Yes, sir; he told me to get an estimate and present it before the judge." Allocution followed immediately, and Dwight answered, "No, sir." The court then imposed sentence, the record being as follows: "THE COURT . . . Mr. West, you may wonder why (the court imposed imprisonment). You have been less than honest with this court in presenting to me a bill that was not correct. You have been less than honest in the statements here in connection with the payment of damages . . . . If there is ever a time to be absolutely honest it's when you are in the courtroom under oath and before the judge. When you can't be that, you couldn't be to the probation officer. THE DEFENDANT: Sir — THE COURT: Mr. Bosler, you can take him over to the jail. THE DEFENDANT: Your Honor, I was honest. I was always honest to the court. THE MOTHER: What was he dishonest about? THE COURT: You will be right over with him. I don't want any words with you, Mrs. West. THE DEFENDANT: Mom, come on."

In overruling the motion of Dwight for a new trial on August 13, 1971, without the presence of Dwight, the court said to defense counsel: "The situation here was so premeditated, they circled the block three times before they committed this act."

Dwight had acknowledged damage in the sum of $109 on May 7 and prior to withdrawal of his plea of not guilty. A lack of veracity on his part is unproved.

If malicious destruction or injury to property is less than $100, the offense is a misdemeanor. § 28-573, R. R. S. 1943. If the destruction or injury amounts to $100 or more, the offense is a felony punishable by imprisonment not less than 1 year nor more than 3

years, or by a fine not more than $1,000. § 28-572, R. R. S. 1943.

This court may reduce a sentence when in its opinion the sentence is excessive. In such case the court is under a duty to render such sentence as the evidence warrants. See § 29-2308, R. R. S. 1943.

A variable relating to the criminal process is anomie. It means "a condition of society in which its members feel that normative standards of conduct and belief are lacking. The aspect . . . is . . . a feeling on the part of the public that government is permitting certain community values and norms to deteriorate. . . . When government . . . assumes the role of protecting the community from such conduct, it also assumes the role of guardian of the . . . norm that is to be protected from attenuation by that conduct. . . . If the state . . . does not demonstrate an interest in enforcing it, the public—should it feel strongly about the norm—will become anxious. . . . The public will then focus upon the avowed protector of the norm as the cause of its anxiety and unrest and the result will be lack of faith in government with all the ramifications that may follow." New York Governor's Special Committee on Criminal Offenders, "The Penal System: Treatment as Prevention," Gerber & McAnany, Contemporary Punishment 256-7 (1972). Cf. § 29-2260 (2) (c), R. S. Supp., 1971. Anomie is a variable not to be forgotten, although its weight is light in any one case.

Another variable is the emotion of the judge in determining and pronouncing the penal sanction. Should we deny its existence altogether, the illusion might cheat the reader. See Frank, Courts on Trial, 405-15 (1969). On the other hand, a sentence dictated by inordinate emotion is suspect. It is only by coincidence that it finds support in the evidence. See A. B. A., Standards Relating to Appellate Review of Sentences, § 1.2, p. 23 (Approved Draft, 1968). At a sentencing hearing it is especially important that the judge steel himself

against predilection. Otherwise he may fuel the raging fire in youth against "the establishment."

The coincidence of a sentence dictated by inordinate emotion but warranted by the evidence happened in the present case. The judgment is affirmed.

AFFIRMED.

BOSLAUGH and NEWTON, JJ., concur in result.

NEWTON, J., concurring.

I concur in the result arrived at in the opinion of Smith, J. In my judgment the reasoning by which a sentencing judge arrives at a decision to pronounce a certain sentence is neither material nor relevant to a consideration of the sentence on appeal. In determining whether a sentence is excessive, or just and proper, this court must look solely to the record.

IN RE APPLICATION OF WELLS FARGO ARMORED SERVICE CORPORATION OF NEBRASKA, INC.
WELLS FARGO ARMORED SERVICE CORPORATION OF NEBRASKA, INC., APPELLEE, V. BANKERS DISPATCH CORPORATION, APPELLANT.
198 N. W. 2d 195

Filed June 9, 1972. No. 38272.

1. **Public Service Commissions: Appeal and Error.** On appeal from the Nebraska State Railway Commission, judicial review is limited to a determination whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
2. **Carriers: Words and Phrases.** A contract carrier is one, other than a common carrier, which furnishes transportation service to meet the special needs of the individual shipper or shippers.
3. **Carriers: Public Service Commissions: Evidence.** In considering an application for a permit as a contract carrier the Nebraska State Railway Commission is required to weigh the special needs of shippers desiring contract carrier service against the adequacy of existing common carrier service. The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in de-

termining if the grant of the application would be consistent with the public interest.

4. ———: ———: ———. The burden is upon the applicant for a permit as a contract carrier to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing, and able to perform the service, and that the proposed operation will be consistent with the public interest.
5. ———: ———: ———. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
6. ———: ———: ———. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and is protested by common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers.
7. ———: ———: ———. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers.
8. ———: ———: ———. Where there is evidence to sustain the factors for and against the issuance of a permit to a contract carrier, which is required to be considered by the Nebraska State Railway Commission by sections 75-301 and 75-311, R. R. S. 1943, the determination of the public interest is for the commission and not the courts.
9. ———: ———: ———. Past unlawful actions do not necessarily bar on the grounds of unfitness future grants of operating authority if the public interest will best be served by approval.

Appeal from the Nebraska State Railway Commission. Affirmed.

W. W. Wallin and Acklie & Peterson, for appellant.

James E. Ryan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from an order of the Nebraska State

Railway Commission granting the application of the appellee, which we will refer to herein as Wells Fargo, for a permit to operate as a contract carrier intrastate under the provisions of section 75-311, R. R. S. 1943. The appellant, which we will refer to as B.D.C., was the sole protestant before the commission and is the holder of a certificate as a common carrier intrastate of certain commodities which include those authorized under the permit granted Wells Fargo.

The permit to Wells Fargo authorized the carriage of audit and accounting media, business records, cash letters, checks, data processing media, and microfilm over irregular routes between all points in Nebraska subject to the restriction that, "All transportation . . . must originate or terminate at the facilities of the following:" (here in the order are named eight certain financial institutions located in Omaha, Lincoln, and Beatrice, Nebraska). A further restriction was added at the time B.D.C.'s motion for reconsideration was overruled and it was that Wells Fargo, ". . . may not contract for services authorized by this permit except with the above-named banking institutions."

Under the provisions of section 75-311, R. R. S. 1943, the issues before the commission were: (1) Was the proposed service that of a contract carrier; (2) if it was, whether Wells Fargo was fit, willing, and able to perform the service; and (3) whether the service would be consistent with the public interest.

In support of its order granting the permit the commission made a detailed opinion and affirmative findings on all of these issues.

On this appeal we review the findings, order, and record in the light of the principles we now set forth. On appeal from the Nebraska State Railway Commission, judicial review is limited to a determination whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. Wells Fargo Armored Car Service

Corp. v. Bankers Dispatch Corp., 186 Neb. 261, 182 N. W. 2d 648. A contract carrier is one, other than a common carrier, which furnishes transportation service to meet the special needs of the individual shipper or shippers. § 75-302, R. R. S. 1943. In other words, the commission is required to weigh the special needs of shippers desiring contract carrier service against the adequacy of existing common carrier service. The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining if the grant of the application would be consistent with the public interest. Hagen Truck Lines, Inc. v. Ross, 174 Neb. 646, 119 N. W. 2d 76.

In considering an application for a permit to operate as a contract carrier, the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing, and able to perform the service, and that the proposed operation will be consistent with the public interest. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., 183 Neb. 229, 159 N. W. 2d 310. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established. Samardick of Grand Island-Hastings, Inc. v. D.B.C. Corp., *supra*. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and is protested by common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., *supra*. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers. Samardick of Grand Island-Hastings, Inc. v.

B.D.C. Corp., *supra*. Where there is evidence to sustain the factors for and against the issuance of a permit to a contract carrier, which is required to be considered by the Nebraska State Railway Commission by sections 75-301 and 75-311, R. R. S. 1943, the determination of the public interest is for the commission and not the courts. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., *supra*.

The evidence clearly does support the finding by the commission that the proposed service is specialized and designed to meet the needs of specific shippers. The evidence shows that Wells Fargo has entered into contracts with the eight financial institutions. Representatives of these eight organizations testified on behalf of Wells Fargo and their testimony supports the following conclusions and findings. These organizations furnish computer service for various banks scattered throughout the State of Nebraska. This service includes the pick up from and redelivery to the bank being served all of the items authorized to be transported. If such service is to be performed efficiently and effectively the commodities must be delivered to the computer on schedule and the results picked up on schedule so as to be returned to the bank being served so that they can be used in the next day's transactions. The evidence further supports the finding by the commission that deficiencies exist in the existing common carrier service including: Late deliveries, unwillingness to service correspondents who desire the service, discontinuance of schedules on short notice, unavailability of personnel to telephone communication, and unsatisfactory basis of charges. Most of the witnesses testified that they would not again use the services of B.D.C., but would make other arrangements such as furnishing their own carrier service.

The commission found from the evidence that Wells Fargo had been serving the eight institutions under "color" of authority as defined in Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d

865. All of the witnesses from the contracting banks testified that the service of Wells Fargo met their special requirements in a highly satisfactory manner. Some stated that continued service from Wells Fargo was important or critical to their business and that alternative modes were not satisfactory. The commission finding that Wells Fargo was fit, willing, and able to perform the services is not unreasonable or arbitrary.

The commission made a finding that although the protestant might lose some revenue by reason of the grant of the application this was conjectural and the revenue already lost was attributable in part to unsatisfactory service; and that denial of the application would have an adverse effect on the supporting shippers which would not be in the public interest. This finding is supported by the evidence.

B.D.C. contends Wells Fargo is not fit to perform the service because after the opinion of this court in Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., *supra*, Wells Fargo continued to perform services as a contract carrier in violation of the mandate in that case. A complaint by B.D.C. to the commission for such violation was consolidated before the commission for trial with the application here being considered. Because of the admitted violation by Wells Fargo the commission imposed as part of its order a suspension of the permit granted, ". . . for a period of fifteen (15) days after the rates for the proposed service have been approved by the commission." We concur with the conclusion of the commission that past unlawful actions do not necessarily bar on the grounds of unfitness future grants of operating authority if the public interest will best be served by approval. Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra*.

One other matter should be noted. B.D.C. argues that Wells Fargo could transport cash letters from all of the state's banks by entering into an arrangement whereby the contracting bank would pay the freight charges

for transportnig cash letters from the noncontracting banks to the eight contracting banks. With reference thereto the commission found that if these speculative arrangements came to pass they were matters for enforcement in the future. We concur.

AFFIRMED.

MAXINE SQUIRES, ADMINISTRATOR OF THE ESTATE OF JAMES R. SQUIRES, AND MAXINE SQUIRES, INDIVIDUALLY, APPELLEES, V. IMPLEMENT DEALERS MUTUAL INSURANCE COMPANY, APPELLANT, IMPLEADED WITH ENO INSURANCE AGENCY, INC., ET AL., APPELLEES.

198 N. W. 2d 469

Filed June 9, 1972. No. 38341.

1. **Courts: Trial: Verdicts: Appeal and Error.** Findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
2. **Insurance: Principal and Agent.** An insurance agent who solicits an application for insurance is, in a controversy arising between the insured and the company issuing the policy, regarded as representing the company and not the insured.
3. ———: ———. An insurance agent who with authority receives and receipts for money for renewal of an insurance policy is deemed to all intents and purposes an agent of the company.
4. **Insurance: Notice: Cancellation of Instruments: Contracts.** An erroneous statement by the insurer to the insured that an insurance policy has lapsed for alleged nonpayment of premium is not the legal equivalent of a notice of election to cancel under the terms of the policy.
5. **Insurance: Principal and Agent: Payment: Contracts.** Where an insured because of errors in a billing by the agent of an insurance company pays only that portion of the renewal premium set forth in the billing instead of the entire premium, the renewal policy is not void but is voidable at the election of the company under the terms of the policy.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and J. S. Berry, for appellant.

George O. Kanouff and Curtis Bromm, for appellees Squires et al.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees Johns et al.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

CLINTON, J.

This is an action for a declaratory judgment seeking a determination that a certain automobile liability policy issued to the plaintiffs was in full force and effect on November 19, 1967. The trial judge, a jury having been waived, found the policy was in effect on that date. We affirm the judgment.

The controversy is founded upon the alleged failure of the insureds to pay a premium for a renewal or extension of the term of the policy to cover the 6-month period September 1, 1967, to March 1, 1968. Most of the evidence is not in dispute. Where there is a conflict in the evidence and on the basis of which reasonable minds could arrive at different conclusions of fact, we apply the principle that findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711. Where there is such a significant conflict in evidence, we will point it out in the following summary.

The plaintiffs, James R. Squires, now deceased, and his wife, Maxine Squires, had procured from the defendant Implement Dealers Mutual Insurance Company, through the Eno Insurance Agency, Lincoln, Nebraska, an automobile liability policy No. FC 96267, covering two motor vehicles for the period March 1, 1966, to March 1, 1967. The annual premium on this policy

was $70. In February 1967 the company in accordance with its apparent usual practice notified the plaintiffs and its agent, Eno Insurance Agency, of the coming expiration of this policy. This notification included a billing of $70 for the renewal period March 1, 1967, to March 1, 1968; it stated: "Make check payable to company"; and gave the name and address of the insurer. Under date of February 20, 1967, the agency in writing notified plaintiffs: ". . . your auto policy runs out March 1, 1967. If it would be any help you could take it out for six months which cost would be $35.00." Under date of February 21, 1967, plaintiff Maxine Squires wrote to the agency: ". . . We are billed for the second time from the Implement Dealers Mutual Insurance Co; for the amount of $70.00 for 12 months—I am wondering Can we pay it for 6 months?" On February 23, 1967, plaintiff Maxine Squires made a check to the company for the $35 which the company received, although whether directly or through the agency is not clear from the record. The company as a result of payment of this check credited the plaintiffs' account and under date of March 2, 1967, the agency transmitted to plaintiffs automobile liability policy No. FC 99877, which is the policy involved in this action. This policy covered the period March 1, 1967, to September 1, 1967, and shows a premium charge of $35. The policy provided: ". . . this policy may be continued in force for successive policy periods by payment of the required continuation premium to the company on or before the effective date of each successive policy period. If such premium is not paid when due, the policy shall terminate as of that date and such date shall be the end of the policy period. Such premium shall be computed in accordance with the manuals then in use by the company." It is with reference to the renewal period that the controversy arises.

On April 24, 1967, the agency sent to the plaintiffs an "invoice" indentified in the record as exhibit 6. It

contained the following: Renewal date: 9-1-67; policy number: 99877; company: Implement Dealers; property and coverage: *renewal of combination automobile insurance;* premium: $35. An employee of the agency, testifying for the company, testified that the above billing was for the original policy period March 1, 1967, to September 1, 1967, and that they billed the plaintiffs each 10 days for this amount until shortly before September 1, 1967. On August 29, 1967, the agency received from the plaintiffs a $35 payment by postal money order dated August 28, 1967. This payment the agency credited on what it believed to be the past due premium. The witness testified the agency was unaware of the premium payment to the company for the first 6 months. The agency did not notify the company of this $35 payment. It issued a receipt to plaintiffs for the amount and indicated thereon payment on account. However the witness testified it would have been credited "on account" whether or not it was for the renewal period or on a past due account. The witness stated the agency would not have billed the plaintiffs if it had known of the payment to the company.

Plaintiff Maxine Squires testified that when she sent the money order she did so in response to the invoice previously mentioned and identified as exhibit 6. At that time she wrote on the invoice paid August 28, 1967. The agency on August 29, 1967, acknowledged receipt of the payment and said: "We are enclosing the receipt for payment of automobile insurance premium. Thank you very much!!! We appreciate your patronage, and desire to be of service whenever possible." Under date of August 28, 1967, the agency had sent to the plaintiffs a notice "PREMIUM PAST DUE." This notice is identified in the record as exhibit 8. It stated: "Premium due: $35.00 (3-1-67 to 9-1-67)" and identified policy No. FC 99877. It also stated: "The credit period allowed by the Insurance Company for payment of the above premium is now past and we are required to

obtain prompt payment to maintain your policy in force. The renewal on this coverage is now due also, for Sept. 1 inception, and naturally it is impossible to continue coverage unless premium is paid in full." The "invoice" and the above "premium past due" notice are the only documentary evidence of the billings by the agency.

The trial court clearly could reasonably find that exhibit 8 was not received by the plaintiffs until after they made payment pursuant to the billing of exhibit 6, which we think as a matter of law was according to its terms for a renewal of policy No. FC 99877. The trial court was not required to accept as fact that the periodic 10-day billings were in fact made or that they gave notice to the plaintiffs that exhibit 6 was an erroneous billing for which premium was already paid.

Witnesses for the company testified that between July 1, 1967, and August 15, 1967, in the course of the ordinary practice lapse notices were mailed to the plaintiffs, which notices advised of the premium due for the period September 1, 1967, to March 1, 1968. These indicated premium for that period of $40 and directed that payment should be made to the company for that amount. Testimony was introduced to show the renewal premium was in fact $40. The company relies upon the presumption that a letter addressed, stamped, and posted is presumed to have reached the plaintiffs in the normal course of the mails; that since Maxine Squires testified only that she did not remember receiving such notices, the presumption is unrebutted and the fact finding must be that the notice was received. The company cites Corcoran v. Leon's, Inc., 126 Neb. 149, 252 N. W. 819. However, we do not think the case turns upon whether or not the notice was in fact received. The trial court may have assumed it was and we will assume it was. The situation would then be that the plaintiffs had received two notices for renewal premiums due, one, the invoice for $35, and the other,

the lapse notice for $40. The trial court could have found Maxine Squires acted upon the invoice either unaware of or having forgotten the lapse notice and when she paid the $35 premium on August 28, 1967, which was received by the Agency on August 29, 1967, and credited "on account," that was receipted by the company; likewise that the invoice billing was a billing by the company. There is nothing in the record to negative the agency's authority in these respects. Sections 44-328 and 44-329, R. R. S. 1943, are applicable. An insurance agent who solicits an application for insurance is, in a controversy arising between the insured and the company issuing the policy, regarded as representing the company and not the insured. An insurance agent who with authority receives and receipts for money for renewal of an insurance policy is deemed to all intents and purposes an agent of the company. Heikes v. Farm Bureau Ins. Co., 181 Neb. 827, 151 N. W. 2d 336.

The company relies upon the alleged failure of a renewal to take effect because of the claimed failure to pay the renewal premium and also upon certain communications from the agency dated September 1, 1967, and Setpember 21, 1967, which the witnesses for the company testified were mailed on those dates to the plaintiffs. The first of these notices stated: ". . . the payment which we received from you covers insurance from 3-1-67 to Sept. 1, 1967. Automobile insurance is payable in advance, *and we had advanced this for you.* You have been billed directly from the company for the new premium, which is $40.00. This should be sent directly to them, and covers from Sept. 1, 1967 to March 1, 1968. It is important that this be taken care of immediately, to keep coverage in effect. Let us know if we may be of any help." (Emphasis supplied.) If the emphasized statement were true, then the company had been paid $70, the original full year's premium since shortly before or shortly after the is-

suance of policy No. FC 99877. Since the company apparently billed for the renewal premium the statement must mean only that the agency felt itself indebted to the company for that amount. This of course was not in fact true since the plaintiffs had made payment for the period March 1, 1967, to September 1, 1967, before the policy was ever issued. The plaintiffs were not responsible for and cannot be charged with whatever confusion existed between the agency and the company.

The invoice constituted a solicitation and billing for an extension of policy No. FC 99877. The plaintiffs accepted that solicitation on August 28, 1967, by making payment. The renewal contract of insurance then arose subject to the right of the company to cancel the same in accordance with the terms of the policy. It at no time elected to cancel the renewal.

The communication of September 21, 1967, notified the plaintiffs: ". . . your insurance has lapsed for nonpayment." This last communication was without legal effect because payment had been made.

On November 19, 1967, the accident occurred which made the coverage important. The agency was notified. The company denied coverage. On December 15, 1967, the agency mailed James Squires a check for $35, accompanied by a letter which contained the following: "I assume that the policy period from March 1, 1967 to September 1, 1967, which was billed out of this office to you was paid for in our office, and also to the Implement Dealers. Therefore, this would make a credit to you of $35.00, which we are including our check for." The check was returned by Maxine Squires to the agency.

The company also argues that even if the $35 paid to the agency on August 28, 1967, is applied to the renewal premium it is not payment in full since the premium was then $40 and the obligation to pay the premium is ordinarily an indivisible obligation to pay the entire premium so that a forfeiture is not prevented

by part payment thereof. The company cites McGarrah v. Stockton (Mo.), 425 S. W. 2d 223. Even if it be assumed the payment was only partial, yet under the circumstances of this case it merely made the policy voidable at the election of the insurers. 2 Long, Law of Liability Insurance, § 7.01 et seq., p. 17-2. The cited case is not applicable for the reason that there the insurer gave notice of cancellation under the terms of the policy. Such is not the case here where the insurer erroneously assumed there was a lapse of the policy because premium had allegedly not been paid. The notice of September 21, 1967, is not the same as a cancellation. Whether or not the policy lapsed would depend upon the underlying fact of whether or not the premium was paid or unpaid. We hold: An erroneous statement by the insurer to the insured that an insurance policy has lapsed for alleged nonpayment of premium is not the legal equivalent of a notice of election to cancel under the terms of the policy. Where an insured because of errors in a billing by the agent of an insurance company pays only that portion of the renewal premium set forth in the billing instead of the entire premium, the renewal policy is not void but is voidable at the election of the company under the terms of the policy.

The trial court properly found that a continuation of policy No. FC 99877 for the 6-month renewal period arose out of the billing by the invoice and payment by plaintiffs on August 28, 1967.

AFFIRMED.

CITIZENS STATE BANK, DECATUR, NEBRASKA, A CORPORATION, APPELLEE, V. BEERMANN BROS. DEHY, A PARTNERSHIP, APPELLANT, IMPLEADED WITH DAVID VAVRA, APPELLEE.
198 N. W. 2d 458

Filed June 9, 1972. No. 38358.

1. **Bills and Notes: Time: Contracts.** Unless otherwise specified,

a consent to extension of a promissory note authorizes a single extension for not longer than the original period of the note. § 3-118, U. C. C.

2. **Bills and Notes: Contracts: Parties.** An agreement by the holder to suspend the right to enforce a promissory note against the maker, without the consent of an endorser and without an express reservation of rights against him, discharges the endorser from liability. § 3-606, U. C. C.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded with directions.

Smith, Smith & Boyd, for appellant.

Ryan & Scoville, for appellee Citizens State Bank.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action upon two promissory notes payable to Beermann "Quality" Fertilizers executed on October 2, 1967, by David Vavra. The notes were endorsed in blank and transferred before maturity to the plaintiff bank by the payee for their full value. The payee is a division of Beermann Bros. Dehy, a partnership, and will be referred to as the defendant.

The notes were not paid at maturity on January 2, 1968. On August 29, 1968, Vavra executed two extension notes to the plaintiff which extended the time for payment of the original notes to December 20, 1968. The extension notes were executed without the knowledge or consent of the defendant except as authorized by the original notes.

The extension notes were not paid at maturity. This action was brought on May 2, 1969, against the defendant and Vavra. The defendant appeals from a judgment for the plaintiff.

The principal issue relates to the extension notes executed by Vavra on August 29, 1968. The original notes each provided on their face: "The makers, sureties and

guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest, and notice of protest, and diligence in bringing suit against any party thereto and consent that time of payment may be extended without notice thereof * * *."

Under the Uniform Commercial Code, unless otherwise specified, a consent to extension authorizes a single extension for not longer than the original period of the note. § 3-118 (f), U.C.C. The extension here was for 113 days, 21 days longer than the period of the original notes. An agreement by the holder to suspend the right to enforce an instrument against the maker without the consent of an endorser discharges the endorser. § 3-606 (1)(a), U.C.C. There being no reservation of rights against the defendant, the extension to Vavra by the plaintiff beyond the period authorized in the notes discharged the defendant. See, Kratovil v. Thieda, 36 Ill. 2d 247, 222 N. E. 2d 485; Ford v. Loret, 258 Md. 110, 265 A. 2d 202; American State Bank v. Leaver, 261 Iowa 124, 153 N. W. 2d 348.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment dismissing the action as to defendant Beermann Bros. Dehy.

REVERSED AND REMANDED WITH DIRECTIONS.

ORILLA E. SHELDON, EXECUTRIX OF THE ESTATE OF LILLIE M. SCHNEIDER, DECEASED, APPELLEE, V. SANDRA WATKINS, APPELLANT, IMPLEADED WITH ORILLA E. SHELDON ET AL., APPELLEES.

198 N. W. 2d 455

Filed June 9, 1972. No. 38363.

1. **Property: Joint Tenancy: Wills.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not

pass by virtue of the provisions of the will of the first joint tenant to die.

2. Wills. In the construction of a joint and mutual will the intention of the testators if ascertainable from the language of the will and not contrary to law must govern.

Appeal from the district court for Burt County: GEORGE W. DITTRICK, Judge. Reversed and remanded with directions to dismiss.

Nate C. Holman and Brian Watkins, for appellant.

Charles S. Reed and Bernard T. Pipher, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action for a declaratory judgment by the plaintiff as executrix of the estate of Lillie M. Schneider against the defendant Sandra Watkins, a granddaughter of the decedent. The purpose of the action is to have declared illegal and void certain donative transfers made by the decedent in her lifetime to the above-named defendant. Two items of property are involved. The first is a Cadillac automobile, title to which was transferred by the decedent naming the defendant coowner with right of survivorship in the certificate of title. The decedent also named defendant as joint owner of a certificate of deposit in the amount of $20,000. The automobile and the certificate of deposit were delivered to defendant during the lifetime of the decedent. The defendants other than Sandra Watkins are the daughters and heirs-at-law of the decedent and the beneficiaries named in her will.

The petition in addition to declaratory relief prayed for the return of the property or a money judgment. The foundation of the plaintiff's claim as alleged in the petition is that the decedent and her predeceased husband, John Schneider, "by the execution of a joint and severable (sic) Will . . . entered into an irrevocable mutual agreement whereby they mutually agreed that the sur-

vivor would make no disposition of their property or the property of the survivor of them, contrary to the provisions of the Will."

A jury was waived and the cause tried by the court upon a stipulation of facts entered into by the parties and certain documentary evidence on which foundation was waived. The stipulation includes an admission by the plaintiff: "That almost all property owned by John Schneider and Lillie M. Schneider, at the time of the death of John Schneider, was owned jointly by John Schneider and Lillie M. Schneider; that this included a bank account at the Bank of Valley, Valley, Nebraska, the real estate on which the parties resided and the Cadillac automobile described in plaintiff's petition which were owned by them as joint tenants with right of survivorship." Included in the evidence is the inventory of the estate of John Schneider. All the property described in the inventory save the household goods is stated therein to be held in "Joint Tenancy." The inventory of the estate of the decedent describes the same property save a quantity of grain and one bank account which appears only in the inventory of the estate of John Schneider. These inventories are signed by the plaintiff, the first-mentioned as administratrix CTA and the second-mentioned as executrix of the estate of Lillie M. Schneider. We interpret the stipulation taken together with the recitals in the inventories as to the nature of title to constitute an agreement of the parties that the source of the $20,000 certificate of deposit was property which passed from John Schneider to Lillie M. Schneider by survivorship.

The trial court found that: "Lillie M. Schneider, deceased, prior to her death, improperly diverted from her legatees and devisees the $20,000.00 Certificate of Deposit and the 1966 Cadillac automobile." It rendered judgment against Sandra Watkins for $23,200.

We reverse the judgment and direct the plaintiff's petition be dismissed.

As we view this case it presents only questions of law. The will was executed by John Schneider and Lillie M. Schneider in 1954. The record does not show what property was owned by them at that time or the nature of the title. The pertinent provisions of the will are as follows:

"In the name of God, amen. We, JOHN SCHNEIDER and LILLIE M. SCHNEIDER, husband and wife, of Sarpy County, Nebraska, both being of sound mind and disposing memory, blessed be to God for the same, hereby make our joint and mutual Will in manner and form following, that is to say:

"FIRST. The first to die directs that his or her funeral expenses, just debts and the costs and expenses of administering his or her estate be first paid.

"SECOND. The first to die hereby gives, devises and bequeaths to the survivor, absolutely and forever, the remainder of his or her estate, both real and personal, after the payment of the obligations referred to in paragraph one hereof. . . .

"FOURTH. In case the joint makers of this Will should die at or about the same time, or in case the survivor should not live long enough to probate the Will of the first to die, then and in such case the joint makers of this Will hereby make the following distribution of their property and of the property of each of them, to-wit:

"To our daughters, ORILLA E. SHELDON, EDITH M. HARDY and SYBIL T. ANDERSON, to share and share alike, and we hereby appoint our daughter, ORILLA E. SHELDON, Executrix hereof in the event either the Executor or Executrix cannot serve as provided in paragraph three hereof.

"FIFTH. We hereby revoke all former Wills made by either of us.

"SIXTH. Each of us solemnly promises the other

that he or she will not revoke or change this Will or make any disposition of his or her property by Will, contract, gift or otherwise without at least five days' notice in writing to the other of his or her intention to do so; that any disposition of his or her property in violation of this provision shall be void. No change of any kind shall be made by the survivor affecting the disposition of the property by the first to die made by this Will."

John Schneider died December 6, 1969, and the will was admitted to probate as his will on March 13, 1970. Lillie M. Schneider died July 7, 1970, and the will was admitted to probate as her will on August 3, 1970. No further proceedings were had in the estate of John Schneider until after the death of Lillie M. Schneider.

Except for the contingencies mentioned in paragraph FOURTH, i.e., if the makers die at about the same time or the survivor dies before the will is admitted to probate, the will does not by its terms purport to make any disposition of the property of the survivor. The usual dispositive provision by the survivor is absent.

It is apparent that the portion of the first sentence of paragraph SIXTH preceding the semicolon pertains only to dispositions made during the lifetime of both testators because it provides for 5 days' written notice to the other. The literal language of the provisions making void transfers in violation of this provision obviously pertains only to dispositions made contrary to the requirement of "five days' notice in writing."

This leaves for determination the contention of the plaintiff that the last sentence of paragraph SIXTH as follows: "No change of any kind shall be made by the survivor affecting the disposition of the property by the first to die made by this Will," constitutes a binding contractual commitment that the survivor would not dispose of any of his, her, or their property by gift during the survivor's lifetime to anyone other than the beneficiaries named in paragraph FOURTH. The literal

language of that provision makes it apply only to property, disposition of which has been made "by the first to die . . . by this Will." It does not by its terms apply to property passing outside the will. We are not free to rewrite the will to make it apply as the plaintiff contends and as apparently the trial court found. To do so would do violence to the intention of the testators as expressed when and by whatever means they acquired or placed their holdings in joint tenancy. Since the record is silent on the point, this may have been done as far as we know after the will was made and with the very intention of avoiding its restrictions.

It may be argued that because the will makes no disposition of the estate of the survivor except for the contingencies referred to in paragraph FOURTH and the testators would be deemed to be aware of this, that therefore the last sentence of paragraph SIXTH could apply only to property passing outside the will or by intestacy and so the testators must have intended that it so apply. Even if this argument be acceptible as to intestate property we cannot even by a liberal construction of the will ascertain any intent on the part of the two testators to restrict the right of the survivor to dispose of property passing by survivorship outside the will. The intent of a testator must be ascertainable from the provisions of the will itself. Burton v. Defenbaugh, 132 Neb. 851, 273 N. W. 489; Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917. Property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die. 48 C. J. S., Joint Tenancy, § 1b, p. 910; Arthur v. Arthur, 115 Neb. 781, 215 N. W. 117; McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; McPherson v. Minier, 179 Neb. 212, 137 N. W. 2d 719.

For the foregoing reasons we are not required to reach and determine the validity of the defendant's con-

tention that the specifications of paragraph SIXTH restricting the power to alienate are repugnant to the apparent fee interest devised by paragraph SECOND of the will. Neither are we required to take note of the plaintiff's contention that the failure of the defendant Sandra Watkins to object to the probate of the will as the will of Lillie M. Schneider in some way estops her from defending this action.

We hold the property here in question having passed to Lillie M. Schneider by virtue of her being the surviving joint tenant therein that she was the absolute owner thereof and had the power of disposition of that property, and further that it is not possible by a construction of the will to ascertain an intent on the part of the testators to make the restrictive provisions thereof applicable to property passing by survivorship outside the will.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JENNIE HILTON GARWOOD ET AL., APPELLANTS, V. DRAKE UNIVERSITY, A CORPORATION, APPELLEE.
198 N. W. 2d 336

Filed June 9, 1972. No. 38387.

1. **Trusts: Charities: Equity.** Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under the rules of law.
2. **Trusts: Charities.** If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust.
3. **Wills.** The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.
4. ———. The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then give that intention effect if not contrary to law.
5. **Wills: Charities: Gifts.** A charitable gift will not be permitted

to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest, when construed in the light of all the facts, the intent of the donor is reasonably apparent.

Appeal from the district court for York County: JOHN D. ZEILINGER, Judge. Affirmed.

Ray L. Svehla, John E. Dougherty, and Herman Ginsburg, for appellants.

Davies, Cheuvront & Sutter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

In this action the residuary legatees under the last will and testament of Estella A. McCloud, deceased, contest a cash bequest to Drake University. Judgment was entered for the university and that judgment is affirmed.

The will of testatrix was executed on August 31, 1960, and admitted to probate on April 4, 1969, following the death of testatrix on March 3, 1969. It contained the following provision: "I give and bequeath to the Divinity School of Drake University * * * for scholarship purposes the sum of $10,000.00 * * * ."

Drake University was originally founded as a bible school by the Disciples of Christ for the purpose of training ministers and christian laymen and this remains its purpose. As the university developed, it instituted various colleges such as Fine Arts, Education, Business Administration, etc. Among these colleges was the Divinity School training students for degrees of Bachelor of Divinity and Master of Religion. In 1968 the Divinity School was phased out and a Department of Religion installed. The Divinity School had been a graduate school or seminary. The new department is primarily an undergraduate college although the same general courses of study are available, with the same

physical and library facilities, and the same instructors or professors. Apparently the identical religious training remains available with the exception of sectarian-type courses and the failure to award strictly religious degrees. In some churches the graduates may still step directly into the ministry although others require additional training in seminaries. Present enrollment in the Department of Religion is approximately 1,100 of whom 19 are preministerial students, all but 2 of whom receive financial assistance. The evidence indicates that many ministerial students now seek a Ph.D. degree rather than the religious degrees. Drake University still maintains separate endowment funds for the Department of Religion and scholarship funds for ministerial students.

The residuary legatees contend that abolition of the Divinity School has caused the bequest to the school to lapse. An analysis of the terms of the bequest is necessary. Although the will states that the bequest is to the "Divinity School," it is apparent this was not intended. The Divinity School was not a legal entity at any time but simply an educational division of Drake University. The bequest was of necessity a bequest to the "University" and the mention of the Divinity School is directory in nature. It is indicative of the testatrix' intent to provide scholarship funds for the use of students in the Divinity School. Since the Divinity School was a school for the education and training of preministerial students, it appears that testatrix intended to assist in the education of this type of student. A preministerial education is still available at the university and it still has students who intend to enter the ministry. The funds may still be applied by the university for the purpose specified by testatrix. It is true that these students are no longer graduate students and that the Department of Religion, unlike its predecessor the Divinity School, is not a graduate college. This does not affect the obvious dominant intent of testatrix to further

or assist in the education of preministerial students.

"Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under the rules of law." Hobbs v. Board of Education, 126 Neb. 416, 253 N. W. 627. See, also, Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86.

"If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust." Board of Trustees of York College v. Cheney, 158 Neb. 292, 63 N. W. 2d 177.

"The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law." Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672.

"The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then give that intention effect if not contrary to law.

"A charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest when construed in the light of all the facts, the intent of the donor is reasonably apparent." Nat'l. Bk. of Commerce Trust & Sav. Assn. v. Crowell Memorial Home, 181 Neb. 341, 148 N. W. 2d 304.

We conclude that the intent of testatrix is clear and that it can and will be complied with by the payment of the bequest to Drake University. The bequest has not lapsed.

The judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent because I want no part in making a new will for the testator.

The bequest was specifically to the Divinity School of Drake University. The Divinity School at the time the will was made was a graduate college or seminary, conferring divinity degrees. Since the making of the will, the Divinity School has passed out of existence. To now hold that the Drake University undergraduate school took its place, because it has some religious courses which are a part of the curriculum of every church-related school, is to strong arm the will and the law.

INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLANT, V. COUNTY OF HALL, A BODY POLITIC AND CORPORATE, APPELLEE.
198 N. W. 2d 490

Filed June 16, 1972. No. 38136.

1. **Insurance: Statutes.** Section 44-501, R. R. S. 1943, directly conflicts with section 44-380, R. R. S. 1943.
2. **Insurance: Statutes: Contracts.** Section 44-501, R. R. S. 1943, as amended and reenacted by the 1951 Legislature, provides that a fire insurance policy shall conform as to provisions, agreements, and conditions with the 1943 Standard Fire Insurance Policy of New York, and declares that no other or different provision, agreement, or clause shall be made a part of such fire insurance policy.
3. **Insurance: Statutes: Contracts: Damages.** Under section 44-501, R. R. S. 1943, as amended in 1951, an insured's recovery on a fire insurance policy is limited by the provisions of the policy as written in conformity with the 1943 Standard Fire Insurance Policy of New York.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Luebs, Tracy, Huebner & Dowding, James A. Beltzer, and D. Steven Leininger, for appellant.

Sam Grimminger and Robert Paulick, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

A house owned by the defendant was completely destroyed by fire. Pursuant to section 44-501, R. R. S. 1943, the policy insured the dwelling "to the extent of the actual cash value of the property at the time of the loss," the "amount of insurance" written in the policy was in the sum of $8,500. Section 44-380, R. R. S. 1943, provides: "* * * the amount of the insurance written on such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." The question involved is whether the insured may recover the full face value of the policy in the sum of $8,500 or only the actual cash value of the property at the time of the loss. The district court held that the insured could recover the full face amount in the sum of $8,500. We reverse the judgment of the district court.

Section 44-380, R. R. S. 1943, requires a "valued" policy in which the face amount of the insurance becomes liquidated damages and is recoverable irrespective of the actual value of the loss. Section 44-501, R. R. S. 1943, on the other hand, incorporates the provisions of the 1943 Standard Fire Insurance Policy of the State of New York, the provision in the insurance contract here, and requires an "open" policy providing recovery of the actual value of the loss, and the amount of the insurance designated in the policy being a limitation on recovery. Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141 (1953). As a matter of original analysis and on authority, there is a direct conflict between the two statutory provisions. Borden v. General Insurance Co., *supra;* State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689 (1914); Fadanelli v. National Security Fire Ins. Co., 113 Neb. 830, 205 N. W. 642 (1925). Prior to 1951, section 44-501, R. S. 1943, read

in part as follows: "No fire insurance company shall issue any fire insurance policy covering any property or interest therein in this state other than on a form prescribed by the Department of Insurance *as nearly as practicable* in the form known as the New York standard as adopted by the state in the year 1913 * * *." (Emphasis supplied.) The words "as nearly as practicable" in the pre-1951 statute were seized upon in State ex rel. Martin v. Howard, *supra,* and Fadanelli v. National Security Fire Ins. Co., *supra,* to reconcile the two statutes. Section 44-501, R. R. S. 1943, in its original context, was adopted in 1913, and in 1914 this court in State ex rel. Martin v. Howard, *supra,* stated as follows: "The act which we are now considering consists of nearly 200 sections. Scattered throughout there are sections which are inconsistent with the New York standard form, such as * * * the provision in Section 74 providing for valued policies." That case also stated: "The only matter in which any discretion in this regard is left to the board is that the form it is required to prepare shall be 'as nearly as practicable in a form known as the New York standard, as now or may hereafter be constituted.' This is an exceedingly narrow limitation which was no doubt inserted in order that the form of the New York policy might be modified so as to conform to a number of other provisions in the act which would be inconsistent with it if copied in its original form." In 1925 this court in Fadanelli v. National Security Fire Ins. Co., *supra,* again ruled on the question as follows: " 'We are of the opinion that it was the intention of the legislature that the New York form should be adopted as the basis of the insurance contract, and that the words "as nearly as practicable" should be construed to mean as nearly as practicable considering the other provisions contained in the insurance code which in anywise are inconsistent with or modify the provisions of the New York standard form of contract.' "

See, also, Mayfield v. North River Ins. Co., 122 Neb. 63, 239 N. W. 197 (1931).

This reconciliation was eliminated by the Legislature in 1951 when it enacted a new version of section 44-501, R. R. S. 1943. The new section, as amended in 1951, provides: "No policy or contract of fire and lightning insurance, including a renewal thereof, shall be made, issued, used or delivered by any insurer or by any agent or representative thereof, on property within this state other than such as *shall conform in all particulars* as to blanks, size of type, *context, provisions, agreements and conditions* with the 1943 Standard Fire Insurance Policy of the State of New York, a copy of which shall be filed in the office of the Director of Insurance as standard policy for this state, *and no other or different provision, agreement, condition or clause shall in any manner be made a part of such contract* or policy or be endorsed thereon or delivered therewith except as provided in subsections (1) to (9) of this section." (Emphasis supplied.)

Extended analysis is not indicated. The intent of the Legislature is abundantly clear. The holdings of Howard and Fadanelli were destroyed with the elimination of the words "as nearly as practicable." In this new amendment and act not only were these words of reconciliation eliminated, but the statute affirmatively declares that no other or different provision, agreement, condition, or clause shall in any manner be made a part of such contract or policy.

The fundamental principle of statutory construction is to determine the intent of the Legislature. There is no ambiguity or gap in the new statute which indicates or requires us to resort to any of the traditional rules of statutory construction in order to ascertain the intent of the Legislature. The new statute says what it means and means what it says, and that declaration is that no other or different provision, agreement, condition, or

clause shall in any manner be made a part of such contract or policy.

We observe that the Legislature, when enacting the 1951 amendment, is presumed to have known the preexisting law. In enacting this later amendatory statute there could be no other conclusion but that the language was intentionally changed for the purpose of effecting a change in the law itself. Familiar rules on statutory construction also strongly support this conclusion. See, Hills v. Burnett, 172 Neb. 370, 109 N. W. 2d 739; Hurley v. Brotherhood of R. R. Trainmen, 147 Neb. 781, 25 N. W. 2d 29; Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366.

We therefore come to the conclusion that section 44-501, R. R. S. 1943, as amended in 1951, and now the present existing statute, controls the conflict between these statutes and that the defendant's recovery is limited by the provisions of the policy as written in conformity with the 1943 Standard Fire Insurance Policy of New York.

This is a declaratory judgment action to determine which provision of the statute prevails. No issue is presented to us, therefore, as to the resolution of the amount of the actual loss of the defendant under the terms of the policy.

The judgment of the district court is, therefore, reversed and the cause remanded with directions to enter a judgment in conformity with the conclusion reached herein.

REVERSED AND REMANDED WITH DIRECTIONS.

NEWTON, J., dissenting.

I respectfully disagree with the majority opinion. Under that opinion an insurance company may deliberately and knowingly overinsure a property against loss by fire. It may, over a period of years, collect premiums on the basis of the inflated value and then, when a loss occurs, contend that the actual value of the property was less than its insured value and pay

only the actual value. It would seem that if this is to be accepted as the law, equity would require the insurer to at least refund, with interest, all excess premiums collected.

The opinion is based on the theory that Laws 1951, c. 139, § 1, p. 572, repealed by implication section 44-380, R. R. S. 1943. This court stated in Steeves v. Nispel, 132 Neb. 597, 273 N. W. 50: " 'Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature.' "

In Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860, we stated: "Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication." In that case it is further stated that: "Statutes pertaining to the same subject matter should be construed together. Such statutes, being pari materia, must be construed as if they were one law and effect given to every provision."

To the same effect is State ex rel. Retchless v. Cook, 181 Neb. 863, 152 N. W. 2d 23, wherein it is stated: "All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision."

"In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it."

As pointed out in the majority opinion, section 44-

501, R. R. S., 1943, prior to 1951, stated that the New York standard form of policy should be followed "as nearly as practicable." These words were construed by this court as an indication that it was not the legislative intent to render section 44-380, R. R. S. 1943, nugatory. See, Fadanelli v. National Security Fire Ins. Co., 113 Neb. 830, 205 N. W. 642; State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689.

In State ex rel. Martin v. Howard, *supra,* it is pointed out that the original act required deviation in many respects from the New York standard form. In Fadanelli v. National Security Fire Ins. Co., *supra,* reasons other than the inclusion of the words "as nearly as practicable" were given for construing the valued policy act in conformity with the requirements of section 44-380, R. R. S. 1943. It is therein stated: "The valued policy act was designed to repress an evil practice, and thereby advance public interest and promote public justice by securing for the assured a policy payment, in the event of total loss, of the full amount of indemnity for which he contracted, and for which he paid. In the present instance we have a recurrence of the evil practices above referred to, to wit: The endeavor to secure a settlement by the insurer for less than his contract in terms imposes upon him. This conclusion certainly cannot be gainsaid. It must be admitted that the purpose of the rebuilding clause in the policy in question, and its only purpose, was and is that it might enable the defendant company, in case of a total loss, to discharge its liability on the policy by an expenditure of a less sum of money than would be required to pay the amount of insurance named in the policy. In no other way could the company derive any benefit from that clause. If the expense of rebuilding would exceed or even equal the amount of the insurance mentioned, there could be neither advantage nor object on the part of the company to undergo that trouble, and when the expense is less the performance of that condition by

rebuilding the destroyed property would be but a mode of satisfying the obligations of the company by payment to persons other than the assured of a sum less than became payable on the policy according to the provisions of the statute. Thus, the evident purpose by this method is to accomplish by indirection the effect of a transaction expressly prohibited by the ordinary construction of the terms of the section of the statute involved."

There never has been a direct attempt to repeal section 44-380, R. R. S. 1943. The section has been consistently enforced by the decisions of this court. Certainly the existence of these court decisions and of the statute were within the knowledge of the legislators, yet the statute was not repealed. The implication is that it was the legislative intent to leave it in full force and effect. Section 44-501, R. R. S. 1943, is a general statute dealing with the New York standard form whereas section 44-380, R. R. S. 1943, is a special statute enforcing the insurance contract according to the amount of insurance stipulated and paid for. Under the rules of statutory construction, the special statute prevails over the general statute. The two must be construed together and effect given to both. Repeals by implication are not favored. Particularly is this true when a long-settled and well-recognized legal doctrine is at issue and there has been no attempt to repeal the statute in controversy.

As pointed out in Fadanelli v. National Security Fire Ins. Co., *supra*, there are good reasons for sustaining section 44-380, R. R. S. 1943. To hold otherwise is tantamount to sanctioning a legal fraud. It promotes a situation whereby, as hereinbefore pointed out, fire insurance companies may knowingly sell excess insurance policies, collect premiums on the excess insurance, and then in the event of a loss pay off for a lesser amount. Certainly, such was not contemplated by the Nebraska Legislature.

SPENCER, J., joins in this dissent.

CLINTON, J., concurring.

I concur in the opinion of White, C. J. In so doing I call attention to the provisions of sections 44-601, 44-602, and 44-603, R. R. S. 1943, which make it unlawful for any insurance company or agent to issue, or any person having an interest in property to procure a fire insurance policy in excess respectively of the fair value of the property, or the value of the insured's interest in the property. While these statutes refer only to the hazard of fire and may be intended primarily to discourage arson they are, since the other hazards to be insured against are normally included in the same policy and therefore the same stated value must apply to all hazards, indicative of a general legislative intent to limit indemnity to actual cash value. In this light section 44-380, R. R. S. 1943, is an anomaly.

As a practical matter under the opinion in this case no unfairness can result if both insurer and insured make an appropriate and mutual determination of the actual cash value to be stated in the policy.

McCOWN, J., dissenting.

I concur generally in the dissent. In addition, it should be noted that the two statutes involved here can be reconciled within the general-special classification limits. The provisions of the New York standard policy apply to "*all* direct loss by fire or lightning" to *any* property, real or personal, insured under such policy. The valued policy act provides: "Whenever any policy of insurance shall be written to insure any *real property* in this state against loss by fire, tornado, or lightning, and the property insured shall be *wholly destroyed,* * * * the amount of the insurance written on such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." § 44-380, R. R. S. 1943. (Emphasis ours.)

The valued policy legislation was enacted many years

before the amendment to the statute requiring the use of the New York standard form without variation. There are no express words indicating an intent to repeal any other statute contained in either of the two statutes. To assume that the Legislature intended to repeal the valued policy act when it enacted the statute dealing with the complete New York fire insurance policy form many years later ignores practical realities as well as traditional rules of statutory interpretation.

The ancient maxim that repeals by implication are not favored "has peculiar force in the case of laws of special and local application, which are never deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect." Mancuso v. State, 123 Neb. 204, 242 N. W. 430. There was no such intent here.

SPENCER, J., joins in this dissent.

FRAZIER, INC., A NEBRASKA CORPORATION, APPELLEE, V. 20TH CENTURY BUILDERS, INC., ET AL., APPELLEES, OMAHA POURED CONCRETE COMPANY, A CORPORATION, THIRD PARTY PLAINTIFF, APPELLEE, V. TRANSAMERICA INSURANCE COMPANY, A CORPORATION, THIRD PARTY DEFENDANT, APPELLANT.

198 N. W. 2d 478

Filed June 16, 1972. No. 38170.

1. **Judgments: Pleadings.** The purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law.
2. **Insurance: Pleadings: Contracts.** The obligation to defend a suit for an insured should be determined on the basis of whether the petition filed against him attempts to allege a liability within the terms of the policy.
3. **Attorneys at Law: Affidavits.** An attorney at law who is an attorney for a party in any proceeding in any court of this

state shall not be disqualified as the person before whom the affidavit is made by reason of such representation.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Haney, Wintroub & Haney, for appellant.

Walsh, Walentine, Wolfe, Miles & Katskee, for appellee Omaha Poured Concrete Co.

Schmid, Ford, Snow, Green & Mooney and Boland, Mullin, Walsh & Cooney, for appellee Frazier, Inc.

Spielhagen, Matejka & Spielhagen and Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees 20th Century Builders, Inc., et al.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This appeal is from the sustaining of a motion for summary judgment in a third party action. The principal action was a mechanic's lien foreclosure brought by Frazier, Inc., against Majors, Inc., et al., in which Omaha Poured Concrete Company was subsequently included as a defendant. Majors filed a cross-petition against Fraizer and Omaha Poured, alleging damages as the result of the negligence of Frazier in the installation of the plumbing system which resulted in the collapse of a cement floor poured by Omaha Poured. Omaha Poured was given leave to file a third party complaint against Transamerica Insurance Company as a third party defendant, to recover under the terms of an insurance policy providing coverage to Omaha Poured for consequential damages. We affirm.

Frazier, as a subcontractor under Omaha Poured, installed the plumbing in a building being erected for Majors. The plumbing was installed with removable sleeves around the floor drain to permit the installation of a poured concrete floor. After the completion of the

building, Majors moved its plastic moulding machines onto the concrete floor and started operations. These machines required the discharge of large quantities of water through the drain. After the first day's operation, the concrete floor pulled away from the wall, buckled, and collapsed. It was then discovered that the sleeves had not been properly installed, and after they were removed the water, instead of running off through the drain, went through an unsealed gap into the ground under the floor, undermining it, causing the floor to sink. Notice was immediately given to Transamerica who investigated the damage. Omaha Poured replaced the floor at its own expense. The present third party action involves the amount paid to settle the consequential damages sustained by Majors because of the collapse of the floor, and does not include any part of the cost of replacing the floor.

Omaha Poured was granted leave to file its third party action against Transamerica January 22, 1969. The petition filed January 30, 1969, alleged that Transamerica is obligated to defend Omaha Poured, and to pay any sums of money which may be awarded against Omaha Poured as the result of consequential damages sustained by Majors. Omaha Poured alleged it complied with all of the conditions precedent of said policy, but Transamerica refused to provide coverage for said incident which falls within the terms and conditions of the policy, and has refused to defend Omaha Poured. On June 5, 1969, the issues raised by the third party petition were ordered separated for trial purposes from the issues raised by the principal pleadings.

On July 14, 1969, the day the main action was called for trial, Omaha Poured made a settlement with the other defendants, and judgment was entered against it for Majors' consequential damages in the amount of $14,298.22. The agreement included a covenant that the judgment creditor would not execute against the personal assets of Omaha Poured for more than $1,500 of

the judgment, and would thereafter look to the Transamerica policy for all remaining sums thereunder.

Immediately previous, and on the day judgment was entered, Majors amended its cross-petition to include a special allegation of negligence against Omaha Poured. No notice was given Transamerica of this amendment, but a copy of the judgment entry was mailed to it the same day the judgment was entered.

The trial court sustained Omaha Poured's motion for summary judgment, specifically finding that there was no substantial controversy as to the following material facts: (1) Transamerica knew of the collapse of the floor shortly after it occurred and knew that the potential loss and claim by Majors, Inc., would include not only damage to the floor itself but the very consequential damages which Majors, Inc., ultimately sought by the instant litigation. (2) Pursuant to investigation by representatives of Transamerica, it unequivocally and unconditionally denied any coverage on the policy of insurance for the incident involved herein. (3) Transamerica refused to accede to the demand of Omaha Poured that it take over and defend the cross-petition filed against Omaha Poured by Majors, Inc. (4) Omaha Poured, without the knowledge or consent of Transamerica, entered into a compromise settlement and agreement with Majors, Inc., resulting in a consent judgment against Omaha Poured for the consequential damage sustained by Majors, Inc., with an agreement that no more than $1,500 of the judgment would be collected from Omaha Poured personally. (5) The amendments to the cross-petition of Majors, Inc., just prior to the entry of the judgment were made without the knowledge or consent of Transamerica. (6) The evidence is sufficient to support a finding of legal liability by Omaha Poured to Majors, Inc., for the consequential damage loss to Majors, Inc., resulting from the collapse of the floor, in the amount of the judgment.

The trial court made the following specific findings

of law: First, the policy in question affords coverage to Omaha Poured for the consequential damage claim asserted by Majors, Inc. Exclusions raised by Transamerica in support of its denial of coverage do not apply.

Second, once Transamerica denied coverage to Omaha Poured in the manner in which it did, Transamerica breached its contract with Omaha Poured, relieving Omaha Poured of any obligation under the contract to notify or deal with Transamerica any further regarding the claim.

Third, the allegations contained in the cross-petition of Majors, Inc., prior to the amendments made on July 14, 1969, together with all the pleadings in the case, were sufficient to compel Transamerica to assume the defense of Omaha Poured, and its refusal of Omaha Poured's demand that it do so constituted a breach of its contract with Omaha Poured.

Fourth, Transamerica's breach of its contract with Omaha Poured, by denying coverage and refusing to defend its insured, entitled Omaha Poured to enter into the most favorable settlement and consent judgment possible, which it did.

Fifth, the consent judgment, supported by the evidence, was obtained in good faith and without fraud or collusion. Therefore, having declined to defend the action when called upon to do so, Transamerica may not again litigate the issues that resulted in the judgment.

Transamerica alleges the following assignments of error: (1) Sustaining the motion for summary judgment; (2) determining that Transamerica unequivocally and unconditionally denied any coverage on the policy of insurance; (3) determining there was no genuine issue of material fact; (4) determining that the consent judgment was obtained in good faith and without fraud and collusion; (5) determining that Omaha Poured owed no duty to Transamerica to notify it of amendments to the cross-petition; (6) determining that Transamerica had a duty to defend Omaha Poured under the allega-

tions contained in the cross-petition prior to its amendment; (7) admitting into evidence affidavits offered by Omaha Poured; and (8) failing to sustain Transamerica's motion to vacate the judgment.

Only one of the court's findings of fact set out above is questioned in Transamerica's brief, that being No. (2), which is made the subject of assignment of error No. 2. However, even as to this assignment, nowhere in the brief does Transamerica point out in what manner this finding is incorrect or the subject of any factual controversy. Dwight Stephens, Transamerica's claim representative who first investigated the claim, stated in his affidavit that after completing his investigation he informed Omaha Poured's representative that no coverage was afforded to the insured for the collapse of the floor for the reason that the aforementioned policy did not provide coverage for completed operations and products liability, and that he thereafter reported his findings to his superior, Harold Pace. The affidavit of Harold Pace states that coverage was denied under said policy shortly after May 27, 1967, for the reason that coverage was not afforded thereunder to the insured for completed operations and products liability coverage. There can be no question that Transamerica at all times was insisting that the damage was for completed operations and products liability coverage and it was not covered under the policy.

Transamerica overlooked the fact that its policy did insure Omaha Poured for consequential damages and that the action brought by Majors, Inc., was for consequential damages resulting from the incident. Nowhere in Transamerica's brief does it challenge, by assignment of error or discussion, the finding of the trial court that the Transamerica policy in question affords coverage to Omaha Poured for the consequential damage claim asserted by Majors, Inc. Nor, incidentally, does Transamerica challenge in any manner the trial court's conclusion that as a matter of law the "exclu-

sions raised by third party defendant in support of its denial of coverage" do not apply. There is no merit to Transamerica's first and second assignments of error.

The purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. Growers Cattle Credit Corp. of Omaha v. Swanson (1969), 184 Neb. 612, 169 N. W. 2d 692.

As to Transamerica's third assignment of error, when we pierce the allegations of the pleadings there is no question the material issues are those of law and not of fact.

As to Transamerica's fourth assignment of error, there is not the slightest evidence of fraud or collusion. The settlement was consummated on the morning of the scheduled trial of the main action. Omaha Poured, left to its own resources, at the last moment made a settlement to avoid increased liability. Omaha Poured must have realized, as would any reasonable person in its position, that prudence required it to protect its assets as best it could. There was no question about its liability for consequential damages. There is not the slightest merit to this assignment.

Nor is there merit in Transamerica's fifth assignment of error. Transamerica investigated the incident and denied coverage. It further refused to tender a defense for Omaha Poured. Exhibit 84 to the deposition of Transamerica's claim manager, is a letter from attorneys for Omaha Poured to Transamerica under date of January 10, 1969, reminding it of two previous denials of coverage and of a previous letter dated August 31, 1967, to the effect that Omaha Poured was taking steps to protect itself from the effects of the wrongful denial of coverage. The letter of January 10, 1969, gave Transamerica the trial date of the main action, again tendered the defense of Omaha Poured, and advised that in the event it again declined to provide a defense, a third

party petition would be filed. To hold that Omaha Poured had any additional obligation to keep Transamerica informed of the developments would be absurd.

Transamerica's sixth assignment of error misconstrues the decisions of this court on the point in question. In National Union Fire Ins. Co. v. Bruecks (1966), 179 Neb. 642, 139 N. W. 2d 821, we said: "It would seem that the obligation to defend a suit for an insured should be determined on the basis of whether the petition filed against him attempts to allege a liability within the terms of the policy." Clearly, the inference from the cross-petition and the prayer before the amendment included Omaha Poured, and sufficiently inferred liability to require action on the part of Transamerica. If there was the slightest question, certainly the proceedings culminating in the filing of this third party action, which occurred 6 months before the amendment in question, would have removed any doubt.

Transamerica's seventh assignment of error is predicated on its assertion that affidavits offered into evidence, notarized by an attorney of record, are improper and should be excluded. We direct counsels' attention to section 25-1245, R. S. Supp., 1969, which provides: "An affidavit may be made in and out of this state before any person authorized to take depositions, and must be authenticated in the same way. An attorney at law who is attorney for a party in any proceedings in any court of this state shall not be disqualified as the person before whom the affidavit is made by reason of such representation."

In view of previous comment, Transamerica's eighth assignment of error requires no further discussion. The trial court correctly sustained the motion for summary judgment. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BOBBY JOE WEILAND, APPELLANT.
198 N. W. 2d 327

Filed June 16, 1972. No. 38277.

1. **Post Conviction: Appeal and Error.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. **Post Conviction: Trial: Appeal and Error.** Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Bobby Joe Weiland, pro se.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant appeals from the denial of an evidentiary hearing on his motion for post conviction relief. His original conviction and sentence were affirmed on direct appeal in State v. Weiland, 186 Neb. 325, 183 N. W. 2d 244.

The motion essentially asserts (1) that perjury was knowingly used to convict the defendant at the original trial; and (2) that testimony as to a polygraph test of an accomplice witness was improperly introduced. The second issue was considered and decided by this court in the direct appeal.

The factual issues involving the allegations of perjury rest entirely upon inferences drawn from the testimony

at the original trial, all of which was incorporated in the bill of exceptions. Essentially, defendant asserts that two police officers at a preliminary hearing identified one Phyllis Croghan as defendant's accomplice but at the time of trial, identified one Ronald Leffel instead. Leffel then testified for the State. Two fellow prisoners of Leffel testified that Leffel had told them that if he testified against the defendant, he had been assured that charges against him would be dropped. This testimony was directly contradicted. All of the testimony and the possible inferences to be drawn were fully exploited by competent counsel for the defendant in the original trial. The motion for post conviction relief alleges no facts nor grounds for relief which were not known to defendant and his counsel at the time of trial. The original bill of exceptions reflects the inescapable conclusion that the factual issues were heard and determined by the jury.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review. State v. Lincoln, 186 Neb. 783, 186 N. W. 2d 490.

The judgment of the district court is affirmed.

AFFIRMED.

MAJOR LIQUORS, INC., DOING BUSINESS AS SILVER TAP, ET AL., APPELLEES, IMPLEADED WITH CAESAR'S PALACE, INC., APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
198 N. W. 2d 483

Filed June 16, 1972. No. 38330.

1. **Constitutional Law.** Freedom of speech as guaranteed by the First Amendment may include the right to express thoughts and ideas by means other than speech.
2. **Intoxicating Liquors: States: Powers.** The power of a state to absolutely prohibit the sale of intoxicating liquors includes the power to prescribe conditions under which it may be sold.
3. ———: ———: ———. A state may protect its people against the evils incident to the use of intoxicants, and may exercise a large discretion as to the means employed.
4. **Municipal Corporations: Ordinances: Powers: Constitutional Law.** The use of the police power is ordinarily a matter of public policy and of legislative judgment with which the courts will not interfere unless it exceeds constitutional bounds.
5. ———: ———: ———: ———. A police regulation is not necessarily invalid because it incidentally affects a constitutional right.
6. **Municipal Corporations: Ordinances: Intoxicating Liquors: Powers: Nudity.** An ordinance prohibiting topless female dancing in places licensed for the sale of intoxicating liquors is a valid exercise of the police power.
7. **Constitutional Law: Words and Phrases.** Although "conduct" may entail some elements of expression or speech, when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.
8. **Constitutional Law: Words and Phrases: Intoxicating Liquors: Nudity.** When nudity is employed as a sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition.
9. **Constitutional Law.** When speech elements are only incidental to a course of conduct or activity, such activity in its entirety is not entitled to the protection of the First Amendment.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Stern, Harris, Feldman, Becker & Thompson, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Gary Bucchino, and Roger Stanway, for appellees City of Omaha et al.

Walter J. Matejka, for appellee Major Liquors, Inc.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

In this action the sole plaintiff to appeal challenges the constitutionality of an ordinance of the city of Omaha which provides for the revocation of a liquor license if topless dancing by a female is permitted on the licensed premises. It is asserted that the ordinance conflicts with the First Amendment to the Constitution of the United States which guarantees freedom of speech and with the provisions of the Fourteenth Amendment for equal protection of the laws. We affirm the judgment of the district court holding the ordinance is valid.

Plaintiff contends that "freedom of speech" as guaranteed by the First Amendment includes the right to express thoughts and ideas by means other than speech. Cited in support of this view is Burstyn, Inc. v. Wilson, 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098, holding that motion pictures are protected as they are a significant medium for the expression of ideas; In re Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535, cert. den., 395 U. S. 910, which held that topless dancing could not be banned under an ordinance prohibiting "lewd or dissolute conduct"; Glancy v. County of Sacramento, 17 Cal. App. 3d 504, 94 Cal. Rptr. 864, holding an ordinance banning topless dancing without reference to obscenity was overbroad and unconstitutional; and Hudson v. United States (D. C. App.), 234 A. 2d 903, sanctioning a burlesque dance in the absence of proof of obscenity. The Giannini and Hudson decisions

are based upon the premise that obscenity was not present or satisfactorily proved.

In support of the "equal protection" argument under the Fourteenth Amendment, plaintiff asserts, in substance, that persons engaged in an industry handling intoxicating liquors cannot be classified and dealt with differently from people engaged in other callings. The only case cited which is directly in point, in that it deals with the liquor industry, is La Rue v. State of California, 326 F. Supp. 348. This case held that an ordinance prohibiting live entertainers from engaging in certain "sexual conduct" without regard to the question of obscenity was unconstitutional. Portions of the ordinance prohibiting nude or seminude entertainers were voided.

Defendants rely upon three theories to sustain the ordinance. First, that the liquor industry is subject to strict regulation under constitutionally delegated police powers; second, that public dancing by topless female entertainers is "conduct" not speech or expression; and third, that "speech" elements involved are merely incidental to conduct or activity.

In earlier years saloons, barrooms, and taverns dispensing alcoholic liquors were largely unregulated. This gave rise to numerous abuses. Public disgust and denunciation gradually brought about a steady growth of restrictive controls and culminated in a constitutional amendment imposing absolute prohibition. With the repeal of the national prohibition act, the question of "wet or dry" was again left up to the individual states. One by one the states have again authorized the manufacture, distribution, and sale of alcoholic liquors but in so doing have, without exception, made use of the police powers to impose strict controls on the industry.

The following excerpts from 45 Am. Jur. 2d, Intoxicating Liquors, § 23, p. 502, and § 24, p. 503, are indicative of the general police power: "The power of a state to absolutely prohibit the sale of intoxicating liquor

includes the power to permit the sale thereof under definitely prescribed conditions, and such business or traffic may be permitted only under such conditions as will limit to the utmost its evils. * * *

"A state, in the exercise of its undoubted power to protect its people against the evils incident to traffic in and the use of intoxicants, may exercise large discretion as to the means employed. The form or method of regulation and control is one of public policy for the decision of each state, and frequently the prevailing view is reflected by appropriate legislative enactments. * * *

"The state has far broader power and greater latitude to regulate and restrict the use, distribution, or consumption of liquor than to regulate or restrict ordinary business, because of the effect of the former on the health and welfare of the public. The scope and extent of such regulations depend solely upon the judgment of the lawmakers, with the wisdom of which the judiciary has no concern, provided, always, that they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further that the regulations adopted do not operate a discrimination against the rights of residents or citizens of other states." See, also, § 285, p. 682, wherein it is stated: "Regulations, both municipal and statutory, may properly prohibit the use of attractions or other amusements which may make places where intoxicating liquors are sold attractive to the loiterer. It is not a question, under such regulations, of whether the amusements are of such character as to annoy or disturb persons living nearby or doing business in the vicinity, but whether the prohibited acts will tend to attract or entice people into the place where the liquors are sold."

These general propositions are recognized in federal as well as state law. Ziffrin, Inc. v. Reeves, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128, recognizes the right of

a state to absolutely prohibit the manufacture, transportation, sale, or possession of intoxicating liquors and holds: A state's power absolutely to prohibit the manufacture, sale, transportation or possession of intoxicants includes the lesser power to permit these things only under definitely prescribed conditions.

A state may protect its people against evil incident to intoxicants; and may exercise large discretion as to means employed. See, also, In re Tahiti Bar, Inc., 395 Pa. 355, 150 A. 2d 112.

In Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U. S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336, in approving, as within the police power, certain state price regulations, the court held: It is not the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process.

Under the system of government created by the Federal Constitution it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.

Due process does not authorize courts to hold laws unconstitutional when they believe the legislature has acted unwisely.

Courts do not substitute their social and economic beliefs for the judgment of legislative bodies.

Were constitutionally proscribed acts interfering with personal privileges and liberties literally interpreted, in regard to many subjects, we could have no laws whatsoever. Every law affects and restricts individual rights in some manner and to a greater or lesser degree. They all regulate human conduct and interests in one form or another. For this reason rules of necessity and reasonableness are used in determining the validity of many acts legislatively proscribed. "A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid because it may affect incidentally the exer-

cise of some right guaranteed by the constitution." In re Anderson, 69 Neb. 686, 96 N. W. 149.

"Persons, and their rights of liberty and property, are subject to restraints and burdens which legislature imposes upon them for common good, and, although exercise of a police power may inconvenience an individual or group and may curtail the use, or depreciate the value of property, if the measure reasonably tends to accomplish the purpose of its enactment without unreasonably or arbitrarily exceeding the needs of the occasion, it is a valid exercise of the police power." State v. Sullivan, 245 Minn. 103, 71 N. W. 2d 895. See, also, Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729; Central Markets West, Inc. v. State, 186 Neb. 79, 180 N. W. 2d 880.

Other jurisdictions have divided on the question of whether or not topless dancing by females may be prohibited in places dispensing alcoholic liquors. It has been held that in the absence of obscenity such dancing cannot be prohibited as it is in violation of First Amendment rights. See, In re Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535, cert. den., 395 U. S. 910; La Rue v. State of California, 326 F. Supp. 348.

In Paterson T. & G. Owners Assn. v. Borough of Hawthorne, 108 N. J. Super. 433, 261 A. 2d 677, it was held that a "Community has right to ban from premises of alcoholic beverage licensees the 'topless' and 'bottomless' entertainer or dancer." See, also, Philadelphia Retail L. D. Assn. v. Pennsylvania Liquor Control Board, 360 Pa. 269, 62 A. 2d 53; Adams Newark Theatre Co. v. City of Newark, 22 N. J. 472, 126 A. 2d 340; Hodges v. Fitle, 332 F. Supp. 504.

Is the restriction against females dancing when "topless" or seminude an unreasonable regulation of businesses engaged in dispensing alcoholic liquors? We conclude that it is not. The prime objection of plaintiffs to the ordinance, as appears from their pleading and evidentiary exhibits, is that the banning of such

entertainment reduces their patronage and adversely affects their income. This confesses that the object of this type of entertainment is to lure customers and induce them to indulge in the consumption of alcoholic liquors. The consumption of alcoholic liquors is a practice which although legalized, has never been encouraged in American society. If the use of harmful drugs were to be legalized, should we encourage their use? The attendant evils of intoxication, alcoholism, and highway mayhem are well known and understood. One who consumes alcoholic liquors necessarily succumbs to their influence for the time being. He is more susceptible to ideas and emotions generated by the environment and much more likely to accept what transpires in a lewd or obscene manner than if he viewed the same degree of nudity in an art gallery or witnessed the same activities on the legitimate stage. The basic appeal of this type of entertainment in bars is the titillation of erotic instincts. It is that expectation which attracts the clientele. Such an appeal may well vary in its effects on different individuals as well as with the degree of intoxication, but the police power is intended for the protection of all individuals and the fact that some may not need such protection is irrelevant.

The theory that the ordinance violates the constitutional guarantee of freedom of speech is based upon the ground that dancing, like speech or other activities, may be a "medium of expression." In other words, it may be what is known as "interpretative dancing." The cases above cited which sanction topless dancing are based on this premise and draw the line only at obscene performances. This line of demarcation is now, for all practical purposes, nonexistent. Under terms defined by the federal courts the word "obscene" is now obsolete and without meaning. That definition as set out in La Rue v. State of California, 326 F. Supp. 348, is as follows: " 'Under this definition (of obscenity),. as elaborated in subsequent cases, three elements

must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' " There are few, if any, moves or acts performed by human beings which are not made for some purpose, and which, when simulated, may not be deemed expressive. This being true, adherence to the foregoing definition of obscenity would permit the public performance of almost any type of simulated human behavior.

We do not believe that the line separating the licit from the illicit need be so finely drawn. There is a difference between "conduct" and "speech." In United States v. O'Brien, 391 U. S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672, it is held: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

In City of Portland v. Derrington, 253 Ore. 289, 451 P. 2d 111, cert. den., 396 U. S. 901, 90 S. Ct. 212, 24 L. Ed. 2d 177, it is stated: "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employes is as fit a subject for governmental regulation as is the licensing

of the liquor dispensaries and the fixing of their closing hours. * * *

"Whether or not we agree with the wisdom of the city council's attempt to legislate morals, the question is not one of legislative wisdom, but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety, and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question. The error in the court below was in treating the problem as one of free speech and nothing more."

In Hoffman v. Carson (Fla.), 250 So. 2d 891, involving a nude go-go dancer, it is said: "Appellant loses sight of the distinction between speech and conduct. The statute is not directed at First Amendment rights of free expression, nor does it concern itself with obscenity * * *. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law * * *, and generally considered as having a reasonable relationship to the public welfare, and, therefore, within the police power of the Legislature. * * *

"We find that appellant's performance falls short of presenting a 'speech' issue sufficiently important to outweigh the State's interest in curtailing lascivious exposure in public places. Contributing to this conclusion is the fact that appellant admits that she usually was tipped a certain amount for removing her brassiere and was tipped an additional substantial sum for removing her pants. The trial judge found that: 'Apparently the spontaneity of her "self-expression" was in direct proportion to the monetary consideration she received from the barflies rather than from her ab-

sorption in the artistry of her dance.' "

Is the baring of breasts essential to the expressions intended to be conveyed by the female dancers? Three dancers testified. One was silent on this subject; one conceded that it was not; and the third thought it necessary but conceded the same results could be attained if she were completely covered by a leotard. For a great many years various forms of dancing of an interpretative or expressive nature have been popularly recognized. Perhaps the best known and most highly skilled and regarded as a form of art is the ballet. Although practitioners of the highest form of interpretative or expressive dancing, ballet dancers have not found nudity in any degree to be essential to their performance. The story to be told is expressed without resort to nudity. This being true, it would seem that lesser forms of the art of dancing should not find it necessary or essential to resort to varying degrees of nudity as a medium of expression. These factors, in a case such as we have before us, serve to point up the distinction between conduct and speech.

Whether or not a question of free speech is inherent in the situation presented when the speech elements of an activity are merely incidental to the activity, then the activity in its entirety is not by virtue of its speech elements entitled to the protection of the First Amendment. See Paladino v. City of Omaha, 335 F. Supp. 897.

The argument that the ordinance violates the equal protection clause of the Fourteenth Amendment is not strenuously urged. A legislative body has power to make reasonable classifications for purposes of legislation. See State ex rel. Sorensen v. First State Bank, 122 Neb. 109, 239 N. W. 646.

"The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or a suppression of the traffic do not violate provisions of the state and federal Constitutions relating to due process, privileges or immunities, uniformity, nor, un-

less wholly arbitrary in their discrimination between persons, the equal protection of the law." Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668. See, also, Marsh & Marsh, Inc. v. Carmichael, 136 Neb. 797, 287 N. W. 616.

The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The rationale of the majority opinion, carried to its obvious conclusion, would authorize the City to ban any or all types of entertainment which intended to induce customers to patronize an establishment which sold alcoholic liquors. Any form of entertainment could be banned, paintings and decor could be banned or strictly regulated, and even the playing of music might be prohibited. On the reasoning of the majority opinion, anything which contributes to the enticement of customers into a drinking establishment may be restricted or banned because the sale of alcoholic liquor is subject to strict regulation by the government. The exercise of the police power, however, is not so unlimited. Neither does the fact that the liquor business may be entirely prohibited authorize the State to legalize the business and then "regulate" it by arbitrary fiat without legally justifiable reason. Under any circumstances and at all times even though the liquor industry is subject to strict regulation, the exercise of the governmental power must be in the form of actions which are within the constitutional authorization, are not unreasonable or arbitrary, and are reasonably related to the attainment of a permissible objective. See Central Markets West, Inc. v. State, 186 Neb. 79, 180 N. W. 2d 880.

The basis upon which the majority opinion avoids First Amendment problems is the conclusion that nudity or partially nude dancing presented as entertainment does not involve speech or expression but is only conduct. This holding stems from City of Portland v. Derrington, 253 Ore. 289, 451 P. 2d 111. It should be noted

first that the Oregon Court's conclusion in that case was directed at "the performances and costumes of female *attendants* in bars and taverns." (Emphasis ours.)

The evidence in the case before us shows that the topless female dancers involved in this case were strictly entertainers and did not participate in any way in the selling, dispensing, or serving of alcoholic liquors. It is difficult to separate "conduct" and "speech" or "expression." It is also apparent that elements of "expression" involved in nude or semi-nude attire on the part of employees primarily engaged in their duties of selling and serving alcoholic liquors are minimal contrasted with their "conduct" as attendants. As to such employees, Derrington may well be applicable. This is not true of a dancer who is hired as an entertainer, and that is the case before us. It is obvious, of course, that nudity is "conduct" and subject to regulation. Nevertheless, "dancing" is "expression" and unless it is shown that the dancing is obscene, it is protected by the First Amendment. As Justice O'Connell said in his dissent in the Derrington case: "* * * the city cannot inhibit defendant's right simply because it decides that her nudity may have an adverse moral effect on the community or that it might cause disturbances in the restaurant. Even if dancing were held to be entitled to less protection than some other forms of expression, certainly it cannot be prohibited merely because a part of the public, even a majority, regards non-obscene nude dancing as unacceptable. See Kingsley International Pictures Corp. v. Regents, 360 U S 684, 79 S Ct 1362, 3 L Ed 2d 1512."

Asserted conflict between First Amendment rights and the state police power calls for careful analysis rather than a broad brush treatment. The majority opinion tacitly concedes that the "conduct" involved here does not meet any current tests of obscenity but still refers to "a lewd or obscene manner" and "the titillation of erotic instincts." If the City of Omaha were

actually concerned with preventing the luring of customers into drinking establishments, it is strange that this ordinance is the only one dealing with the subject. Even this one ordinance prohibits only *live* nude entertainment. (Emphasis ours.) It is quite evident that the concern of the City here was not the protection of the citizenry from the evils of alcohol, but, instead, the prohibition of a certain form of entertainment determined to be morally unacceptable by the City, without observing First Amendment constitutional standards established by the Supreme Court. Because many, or even most, citizens find such performances unpalatable or debasing does not mean they lack an expressive element. Even if the dance be regarded as a lower form of expression, it is still expression and merits First Amendment protection, even though it be in the form of entertainment in a commercialized setting. See, Schacht v. United States, 398 U. S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44; Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793; Stanley v. Georgia, 394 U. S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 452; Redrup v. New York, 386 U. S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515.

BOSLAUGH, J., dissenting in part.

I join in that part of Judge McCown's opinion that holds regulation of the liquor industry must be reasonably related to the attainment of a permissible objective and not arbitrary.

JOHANN KOOB, APPELLEE, V. NORTON R. LONG, APPELLANT.
198 N. W. 2d 474

Filed June 16, 1972. No. 38348.

1. **Trial: Evidence: Verdicts.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.

2. **Verdicts: Judgments: New Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
3. **Highways: Streets: Pedestrians: Motor Vehicles.** In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances.
4. **Highways: Pedestrians: Motor Vehicles.** No person shall turn a vehicle from a direct course on a highway unless such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

James R. Hancock, for appellant.

Byron M. Johnson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This personal injury action arose from a car-pedestrian collision, when Johann Koob, plaintiff was crossing Highway 71 between Gering and Scottsbluff, Nebraska, about 7 p.m., on March 2, 1967. The jury returned a verdict for $25,000. Defendant, Norton R. Long, perfected this appeal, contending the trial court should have sustained either his motions for directed verdict or his motion for judgment notwithstanding the verdict.

There are three questions presented by the appeal: First, whether the contributory negligence of the plaintiff was sufficient as a matter of law to bar recovery; second, whether the court erred in instructing the jury under section 39-7,115, R. R. S. 1943, on giving an audible signal before changing lanes if any pedestrian would be affected by such movement; and, third, whether

the trial court erred in failing to grant a mistrial by reason of the questioning of defendant as to his selling of insurance. We affirm the judgment.

Defendant does not contest the amount of the judgment so no purpose will be served by detailing the extent of plaintiff's injuries and damages herein. We consider the facts in the interpretation of plaintiff's first assignment of error in the light of the following rules of law:

"In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom." Hacker v. Perez (1971), 187 Neb. 485, 192 N. W. 2d 166.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." Beshaler v. Helberg (1971), 187 Neb. 584, 193 N. W. 2d 261.

The collision took place in the area of an auction house which is located on the west side of Highway 71, which is a four-lane highway 64 feet 10 inches wide. This four-lane highway divides into two lanes 286 feet 10 inches north of the south driveway of the auction house. The pavement was dry, and the temperature was in the neighborhood of 35 degrees. There are four floodlights in the area of the auction house, and a large lighted auction house sign. The only marked crosswalks for pedestrians in the vicinity of the auction house are 1.1 miles to the north and 1.2 miles to the south. Plaintiff parked his car with other cars on the east side of Highway 71, directly across from the auction house. He then proceeded to cross the highway. There was no direct lighting on the east side of the highway, but witnesses who were standing on the west side of the high-

way in the vicinity of the auction house testified that they were able to see plaintiff on the east side of the highway.

Plaintiff's evidence is that before crossing the two northbound lanes he stood at the curb and looked to the north and to the south for oncoming vehicles. He then crossed the northbound lanes and stopped on the centerline of the highway. At that time he saw headlights of an automobile approximately 350 to 400 feet to the north on the highway. He then proceeded to cross the southbound lane. The evidence is conflicting on the lane being used by the vehicle; how often the plaintiff looked in the direction of the oncoming vehicle; and where the plaintiff was found after the impact. Disinterested witnesses testified defendant's car was straddling the two southbound lanes. Plaintiff's testimony was that he had walked across the innermost southbound lane and was struck by the defendant's vehicle after he entered the curb lane. Plaintiff was struck on the right hip and was carried by the vehicle from 30 to 40 feet south. When the vehicle stopped, plaintiff fell to the pavement in front of the vehicle approximately 3 feet from the curb. Prior to the impact neither plaintiff nor any of the witnesses to the accident heard the sound of brakes or of a horn.

Defendant testified that he was familiar with the area and was traveling 28 to 35 miles per hour approaching the auction house. He observed people "spilling" onto the highway so he put on his blinker light and began to shift to the inside lane. He had shifted fully into the inside lane when he saw the plaintiff illuminated by his left headlight. He did not have time to sound the horn or to apply his brakes. After the impact the plaintiff was knocked clear of the car and was lying behind it when he stopped. Defendant told the highway patrolman who investigated the accident that he did not see the pedestrian until just before the impact. The witnesses who were around the auction house at the

time of the impact did not see people "spilling" onto the highway although some had crossed it prior to the impact. They also testified unequivocally that the plaintiff was carried 30 to 40 feet, slid off the vehicle when it came to a stop, and at that time was in front of the vehicle about 3 feet from the curb.

Was the plaintiff guilty of contributory negligence as a matter of law? The answer must be in the negative. It is only where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom that it is the duty of the court to decide the question as a matter of law. Palmer v. McDonald (1961), 171 Neb. 727, 107 N. W. 2d 655. Here, there were conflicts in the evidence which required the submission of the case to the jury.

The collision occurred at a point more than a mile from a crosswalk in either direction. Plaintiff was within his legal rights in crossing at the point in question. This is not a crossing between two city intersections where an ordinance is applicable. The question as to whether plaintiff exercised due care is one for the jury. "In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances." Nisi v. Checker Cab Co. (1960), 171 Neb. 49, 105 N. W. 2d 523. See, also, Miller v. Moeller (1968), 183 Neb. 508, 162 N. W. 2d 224.

Here, although defendant testified he saw people "spilling" onto the highway, he admits that he did not see the plaintiff until just before the impact. The jury could reasonably have found that he was guilty of gross negligence in failing to see plaintiff, even if, in its judgment, plaintiff was guilty of slight negligence and the question became one of comparative negligence. As we held in Nisi v. Checker Cab Co., *supra*, the question

whether the defendant should have seen the plaintiff, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide.

Defendant's second assignment of error attacks the giving of the following instruction, taken directly from section 39-7,115, R. R. S. 1943: "No person shall turn a vehicle from a direct course on a highway unless such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement." Defendant's assignment of error is predicated upon the following erroneous premise, taken from his brief: "The court did give an instruction number twelve on the subject of Long's change of lanes without sounding his horn if a pedestrian will be effected by the change which was extremely erronous and prejudicial. For instance, how can a pedestrian be affected by the failure to give a warning when the pedestrian has no right-of-way or right to be on the street at that place?" As stated heretofore, in the absence of statute or ordinance, a person may cross a street at any place and is not limited to crossings at an intersection. Defendant owed plaintiff a duty of reasonable care which included proper lookout, reasonable control, and the sounding of a horn when changing lanes. The instruction was proper under the evidence.

The defendant's last assignment of error involves the questioning of defendant concerning insurance, as follows: "Q Mr. Long, prior to your selling investments, didn't you, also, sell insurance? A Three different times in my life I have sold insurance for a while, yes. Q Now, what kind of insurance? A Life, fire, casualty. Q By 'casualty' do you mean automobile? A Right. Q You have adjusted losses to automobiles then? A I did no adjusting. Q Have you talked to adjusters that adjusted losses on automobiles? A No, I don't recall ever having been called by an adjuster.

Q Didn't you talk to the adjusters that were assigned to investigate casualty claims on behalf of the — A I don't recall ever having done so." On direct examination, defendant's counsel had asked him about what professions he had had, and the types of his employment, occupations, and the places thereof. He had elicited that for the last 11 years defendant had sold United Fund Investment Trust and had spent considerable time preaching. Defendant had not specifically mentioned the selling of insurance but had opened up the subject sufficiently for cross-examination in that regard. There is nothing in the cross-examination set out above which can be held to be prejudicial to the defendant on this record. The extent of cross-examination rests in the discretion of the trial judge. He is in a position to observe the conduct and demeanor of counsel and parties. The motion for mistrial was properly overruled.

The judgment is affirmed.

AFFIRMED.

HENRY MASTEN, APPELLEE, V. CAMPBELL MANUFACTURING CO., A CORPORATION, APPELLANT.
FRANCIS E. MASTEN, APPELLEE, V. CAMPBELL MANUFACTURING CO., A CORPORATION, APPELLANT.
198 N. W. 2d 326

Filed June 16, 1972. Nos. 38392, 38393.

Trial: Evidence: Damages. A claimant of substantial damages must furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty if the evidence of damages or the amount thereof are susceptible of definite proof. Damages may not be established by conjecture, speculation, or doubtful proof.

Appeals from the district court for Thurston County: JOSEPH E. MARSH, Judge. Reversed and remanded.

Ronald K. Samuelson and Moodie & Moodie, for appellant.

Neil R. McCluhan of Kindig, Beebe, McCluhan, Rawlings & Nieland, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

These actions were brought to recover "commissions" alleged to be due the plaintiffs from the defendant. The trial court found that Henry Masten was entitled to judgment in the amount of $3,102 and Francis E. Masten in the amount of $2,679. The appeals to this court by the defendant were consolidated by stipulation.

The record shows that the defendant is a corporation engaged in the manufacture of sprayers and other agricultural equipment. The plaintiffs had been employed by the defendant and its predecessor for a number of years. Commencing in 1965, the plaintiffs and one other employee were each paid a commission or bonus in addition to their salary, based upon the invested capital and net income of the defendant.

In 1967, a dispute arose concerning participation by the plaintiffs in the management of the defendant. The plaintiffs demanded a greater voice in the management of the business which was refused. The plaintiffs claim, however, that agreements were made whereby they would receive their commissions for 1967 if they remained in the defendant's employment through the sprayer season. They performed this condition and claim they are entitled to commissions at least equal to those paid the preceding year.

The defendant claims the plaintiffs were not entitled to the commissions unless they were employees in good standing at the close of the fiscal year; there was no consideration for agreements regarding the 1967 commissions; and the evidence as to the amounts due was insufficient.

The evidence was conflicting but, when viewed in the light most favorable to the plaintiffs, was sufficient

to sustain a finding that the plaintiffs were entitled to commissions for 1967. The trial court could find that the plaintiffs were not bound to continue in the employment of the defendant and were free to enter into special agreements concerning the 1967 commissions.

The evidence as to the amount of the commissions due the plaintiffs consisted only of their estimates based upon the amount of business done during the time they remained in the defendant's employment. There was no attempt to produce evidence based upon the defendant's books and records and there is no evidence as to the amount of invested capital or net income of the defendant in 1967.

A claimant of substantial damages must furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty if the evidence of damages or the amount thereof are susceptible of definite proof. Damages may not be established by conjecture, speculation, or doubtful proof. Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318. See, also, Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287.

The judgments of the district court are reversed and each cause is remanded for a new trial on the issue of damages.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JACK LEE ERNEST, APPELLANT.
198 N. W. 2d 335

Filed June 16, 1972. No. 38398.

Criminal Law: Sentences: Appeal and Error. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Jack Lee Ernest, pro se.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant pleaded nolo contendere to a charge of receiving stolen goods. He was found guilty and sentenced to a term of 5 years in the Nebraska Penal and Correctional Complex. The only issue on appeal is his claim that the sentence was excessive.

There is no factual dispute. The record affirmatively discloses that as a part of a plea bargain, an habitual criminal charge against the defendant was dismissed. The sentence authorized by statute for the crime of receiving stolen property is 1 to 7 years. The minimum term on an habitual criminal count is 10 years. There is no presentence investigation report in the record.

A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion. State v. Meloy, *ante* p. 98, 195 N. W. 2d 173. There was no abuse of discretion on the part of the trial court here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE A. EMBREY ET AL., APPELLANTS.
198 N. W. 2d 322

Filed June 16, 1972. No. 38417.

Criminal Law: Evidence: Appeal and Error. It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence, unless it is so lacking in probative force as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Cuming County: MERRITT C. WARREN, Judge. Affirmed in part and in part reversed and remanded as to defendant Richard L. Grovijohn. Affirmed as to all other defendants.

Homer E. Hurt, Jr., for appellants.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

MCCOWN, J.

Four minors were convicted on charges of minor in possession of alcoholic liquor. Wayne A. Embrey and Gary J. Schlecht were each fined $100. Darrell D. Bunn and Richard L. Grovijohn were sentenced to 10 days in jail and fined $175. Grovijohn was also found guilty of disobeying a lawful order of an officer of the Nebraska State Patrol and received a 10-day concurrent jail sentence on that count.

On May 7, 1971, at approximately 11:30 p.m., Quinton Petz, the chief of police of the Village of Beemer, Nebraska, observed the defendant Richard Grovijohn drive a car up and down Main Street several times and then turn into an alley. At about this time, Officer Tobey of the Nebraska State Patrol drove up. Petz got into the patrol cruiser and the officers drove to the opposite end of the alley and parked in a service station lot. Petz went down the alley on foot and observed the Grovijohn automobile stopped in the alley at the rear of the Pastime Bar, some 100 to 125 feet away from his position. Petz saw the defendant Darrell Bunn come out of the bar with two sacks and get into the Grovijohn car. Petz went back to the patrol cruiser and informed Officer Tobey that he believed beer had been purchased. The Grovijohn car came out of the alley, turned away from the patrol cruiser, and proceeded out of town on Highway 275. The officers followed and

stopped the car about one mile east of Beemer. Officer Tobey checked Grovijohn's driver's license and asked if they had beer in the car. Darrell Bunn responded that they did but that he was old enough. Bunn then produced a draft card which the officers knew was not his. Officer Tobey asked the occupants to get out of the vehicle and directed them to stand by the patrol car. Officer Petz then removed two paper bags, each of which contained a 6-pack of beer, from the floor in the rear seat of the Grovijohn car. Officer Tobey arrested the defendant Darrell Bunn and placed him in the cruiser. The other boys got back in the Grovijohn car and Tobey "advised" or "told" Grovijohn to follow him to the sheriff's office in West Point. Darrell Bunn was the only defendant placed under arrest at that time. Officer Tobey testified he did not indicate that any of the other boys had been placed under arrest at that point, nor were any citations written out or issued at the scene. When the officers started to drive the patrol cruiser to West Point, the defendant Grovijohn followed them for a short distance and then turned off. The officers observed the Grovijohn car departing but proceeded on to West Point.

The defendants contend that the evidence is insufficient to establish knowledge or consciousness of actual or constructive possession of the beer except as to Darrell Bunn, who bought it, and Richard Grovijohn, the driver in control of the car. We cannot agree. The evidence established that all four of the defendants had gone to a party together earlier in the evening. The car occupied by the defendants was parked in an alley behind a bar and Officer Petz watched while defendant Bunn got in the car carrying the beer. When the defendants came out of the alley, they attempted to avoid the patrol cruiser. The Grovijohn car was a two-door car and the beer was on the floor of the back seat when the officers removed it a few minutes later. At the time the officers stopped the car on the highway and

during the proceedings there, one or both of the officers testified that they smelled alcohol on the breath of each of the defendants, although the beer in the car had not been opened. While the defendants' testimony tended to disavow knowledge of actual or constructive possession, nevertheless the evidence was sufficient to establish knowledge and consciousness of possession, and to sustain the verdict of guilty. See State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753.

The case was tried to the court without a jury and the weight and credibility of the evidence were clearly for the determination of the trier of the facts. It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence, unless it is so lacking in probative force as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Tindell, 185 Neb. 683, 178 N. W. 2d 571. While to some extent the evidence may be circumstantial and marginal, it was sufficient.

Richard Grovijohn was also convicted of failure to obey the lawful order of an officer of the state patrol. Officer Tobey himself testified that at the time the officers stopped the Grovijohn car and he arrested Darrell Bunn, he did not place any of the other boys under arrest. He also testified that he did not indicate to any of the other boys that they were under arrest at that point. No citation was written out or delivered to anyone at the time. The offense involved here did not rest on a violation of any law regulating the operation of vehicles or the use of the highways. Neither did it involve a felony of any kind. The provisions of section 60-435 or section 60-437, R. R. S. 1943, furnish no basis for the authority to issue an order to Grovijohn to follow Officer Tobey to West Point under the circumstances here. The foundation for a lawful order must rest on its connection with an arrest of Grovijohn. Officer Tobey's own testimony establishes that he did

not arrest Grovijohn or even indicate to him that he was under arrest. The evidence was insufficient to support a verdict of guilty on Count II.

The conviction and sentence of Richard Grovijohn on Count II, for failure to obey a lawful order, is set aside and vacated. As to all other convictions and sentences, the judgment of the trial court was correct and is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED AS TO DEFENDANT RICHARD L. GROVIJOHN. AFFIRMED AS TO ALL OTHER DEFENDANTS.

STATE OF NEBRASKA, APPELLEE, V. EDGAR D. REDEMER, APPELLANT.
198 N. W. 2d 325

Filed June 16, 1972. No. 38430.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Edgar D. Redemer, pro se.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a second motion filed under the Post Conviction Act on an identical ground, namely, that the sentence is excessive. The first motion was not appealed from. The judgment is final and the point raised is res judicata.

Pertinent are the rulings of this court in State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826, and State v.

Dabney, 183 Neb. 316, 160 N. W. 2d 163. See, also, section 29-3001, R. S. Supp., 1969.

See Rule 20.

AFFIRMED.

GEORGE C. BOROWSKI, APPELLEE, V. ARMCO STEEL CORPORATION, APPELLANT.
198 N. W. 2d 460

Filed June 16, 1972. No. 38431.

1. **Workmen's Compensation.** It is unreasonable to conclude that an injury is not latent merely because the plaintiff suffered pain, when thereafter several physicians were unable to correctly diagnose his injury.
2. **Workmen's Compensation: Master and Servant: Notice: Limitation of Actions.** If an employee suffers an injury, which appears to be slight but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
3. **Workmen's Compensation: Evidence: Appeal and Error.** On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Ross & Schroeder, for appellant.

O. William Von Seggern of Cunningham & Blackburn, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an appeal by Armco Steel Corporation, defend-

ant, from a compensation award to George C. Borowski, plaintiff. The only issue involved is whether or not the action was barred by the statute of limitations prior to its commencement on November 30, 1970. We affirm.

On November 15, 1965, while in the employ of the Armco Steel Corporation as an ironworker, plaintiff sustained an injury in the course and scope of his employment. Defendant admits the accident, which occurred when a steel beam fell on plaintiff's right thigh. In the accident his leg was doubled underneath him, and the iron beam was lying across his right thigh. He was taken to St. Francis Hospital, where he was treated by Doctor Bechtel. He was in the hospital for 1½ days but was off work for 2 weeks. When he returned to work he was given lighter chores. He remained with the defendant for 3 or 4 months when his employment was terminated because the job was nearing completion.

The attending physician related plaintiff's physical condition at the time of his injury as follows: "The only positive finding I could find was that he had an obvious injury to the quadriceps muscle of the right lower extremity; the right mid-thigh area; contusions and muscular injuries of the quadriceps muscle of the right thigh." Plaintiff saw Doctor Bechtel for checkups several times during the next 2½ months. All treatments and visits to Doctor Bechtel were paid for by the compensation carrier. Doctor Bechtel informed plaintiff that he suffered damages to the muscles of his upper leg; it would be a slow healing process; and he would feel discomfort or be sore for quite some time, but not to be alarmed. After a period of months the pain subsided.

In the middle part of 1968, plaintiff again began having recurrent discomfort and pain in his leg. He consulted Doctor House, a Grand Island orthopedic surgeon, in August of 1968. He visited Doctor House on seven occasions from that time until the middle of October 1969. The following excerpt from Doctor House' report

is some indication of the condition of the plaintiff during this period of time: "The pain is located in the posterior portion of the patient's thigh, outer portion of the calf with occasion of extension into the patient's foot. The pain that he describes is associated with periods of numbness in the leg and a feeling of heat in the leg. * * * He has had definite back injury prior to this however, in 1966 (1965) his right leg was struck by a beam while working at the New Holland Plant, this laid him up partially for a period of about two to four weeks and then he apparently made a satisfactory recovery although there is still evidence of some transverse creasing of the muscle in the upper third of the thigh anteriorly where he apparently has had some residual muscle damage. * * *

"He has normal motion of the back, forward flexion is slightly uncomfortable. * * *

"On review of x-rays of the lumbrosacral spine other than for evidence of a mild pelvic tilt low on the left and partapes slight narrowing of the L-5, S-1 interspace no other particular abnormality was noted."

Doctor House prescribed the wearing of a built-up right shoe and prescribed muscle relaxants. On January 13, 1970, plaintiff again consulted Doctor Bechtel, who had returned from military service. Doctor Bechtel referred him to Doctor Richard Smith, an orthopedic surgeon, practicing in Omaha. Doctor Smith's history indicates that the plaintiff had no idea that he could conceivably have a back problem. Doctor Smith admitted him to the hospital in April 1970, and performed a myelogram. This revealed a herniated disc at the lumbar sacral inner space, injuring the right first sacral root. It was Doctor Smith's opinion that the herniated disc resulted from the injuries received in the accident in 1965. He also testified that the plaintiff, who had a successful lumbar laminectomy, would have a 10 percent permanent partial disability.

On March 16, 1971, the compensation court awarded

plaintiff total temporary and permanent partial disability and directed the defendant to pay certain medical expenses. Defendant waived hearing before the compensation court sitting en banc, and appealed to the district court for Hall County. After trial in that court, the judgment or award of compensation was affirmed in all respects, and plaintiff allowed the sum of $250 attorneys' fees. This appeal resulted.

Section 48-137, R. R. S. 1943, so far as material herein, reads as follows: "In case of personal injury, all claims for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 48-173." This case is controlled by that statute, unless the plaintiff's injury was latent and progressive. In Clary v. R. S. Proudfit Co. (1933), 124 Neb. 582, 247 N. W. 417, we held: "* * * a latent accidental injury, seeming at first to be trifling and noncompensatory, but subsequently resulting in a progressive disease and a disability, occurs when its true nature is first discovered by him or when the diseased condition culminates in disability."

It seems to be defendant's position that since plaintiff had recurring difficulty with his right leg almost continuously from the time of the accident and this injury was initially compensable, it cannot be contended that the injury herein was latent or progressive within the meaning of our cases. This argument is adequately answered by what we said in Williams v. Dobberstein (1968), 182 Neb. 862, 157 N. W. 2d 776: "It is unreasonable to conclude that an injury is not latent merely because the plaintiff suffered pain, when thereafter several physicians were unable to correctly diagnose his injury. In Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808, we reaffirmed the rule of Astuto v. Ray Gould Co., 123 Neb. 138, 242 N. W. 375: 'If an em-

ployee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.' See, also, Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N. W. 2d 237."

Pain alone is not compensable under our statute. Here, the plaintiff carried on his regular occupation and did not learn of the herniated disc until he was hospitalized in April of 1970. There is no question on this record but that the herniated disc resulted from the injuries plaintiff sustained in the accident of 1965. There also can be little question the defendant did not know he had a back ailment until April of 1970. This action was commenced within 1 year from that date. In 1965, the defendant paid compensation for what appeared to be a minor injury. It is now apparent that the herniated disc resulted from that accident. This is within our rule. Section 48-137, R. R. S. 1943, runs from the time it became apparent that a compensable injury has been sustained. This rule applies where it later becomes apparent that a much more serious injury resulted from the accident than was at first supposed, and the plaintiff had no knowledge that such was the situation, which is this case.

In Gifford v. Ag Lime, Sand & Gravel Co. (1971), 187 Neb. 57, 187 N. W. 2d 285, we said: "On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence." That situation prevails herein.

We affirm the judgment. Plaintiff is allowed an attorneys' fee of $500 for services in this court.

AFFIRMED.

NEWTON, J., concurring.

I concur in the result arrived at in this case. The appellee had been steadily employed since his original injury. The adverse effects of the injuries he received progressively increased until it became apparent that his capacity or ability to work had decreased. Under such circumstances he is entitled to recover. See Peek v. Ayers Auto Supply, 157 Neb. 363, 59 N. W. 2d 564.

STATE OF NEBRASKA, APPELLEE, V. M. L. MILLER, APPELLANT.
198 N. W. 2d 184

Filed June 16, 1972. No. 38458.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

M. L. Miller, pro se.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Affirmed. See Rule 20.

AFFIRMED.

MARY DEGMETICH, APPELLANT, V. AMIEL LOU BERANEK, APPELLEE.
199 N. W. 2d 8

Filed June 23, 1972. No. 38152.

1. **Executors and Administrators: Trial: Evidence.** The admission of an executor or administrator is not receivable against him as a party in his personal capacity.
2. **Executors and Administrators: Limitations of Actions: Trial:**

Evidence. An allowance by an executrix of a demand against the estate based on a promissory note executed by the executrix and the decedent tolls the statute as to the estate but not as against the executrix in her individual capacity.

3. **Bills and Notes: Limitations of Actions: Evidence. To remove the bar of the statute, the debtor must unqualifiedly acknowledge an existing liability.**
4. **Pleadings. The mere allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact.**
5. **Frauds, Statute of: Limitations of Actions: Estoppel. A naked oral promise to pay a debt will not, in the absence of fraud or a specific agreement not to take advantage of the statute of limitations, estop a defendant or debtor to plead the statute of limitations.**

Appeal from the district court for Saunders County: HOWARD V. KANOUFF, Judge. Affirmed.

J. Patrick Green and Jon S. Okun of Eisenstatt, Higgins, Kinnamon & Green, for appellant.

John F. Kerrigan of Kerrigan, Line & Martin, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The issue in this case is whether the statute of limitations has run on three demand promissory notes totaling $9,000. The notes involved were executed in favor of the plaintiff by the defendant and his deceased wife, who was the plaintiff's daughter. The notes were for $1,000, $2,000, and $6,000, and were executed February 20, 1963, November 9, 1963, and March 27, 1964, respectively. This suit was filed August 10, 1970. On promissory notes payable on demand, the period of limitations runs from the date of their making. § 3-122, U. C. C. The applicable statute of limitations is section 25-205, R. R. S. 1943, which provides for a 5-year period of limitations. Since the notes appear on their face to be barred by the statute, the plaintiff's petition is sub-

ject to demurrer unless it alleges facts sufficient to suspend or take it outside the statute. Parkin v. Parkin, 123 Neb. 836, 244 N. W. 638. Generally, to sustain this burden, the plaintiff alleged that the defendant executed a written acknowledgment of the debt subsequent to the making of the notes, and further, generally, that he was estopped by his conduct from invoking the statute. The district court sustained the defendant's demurrer and dismissed the case. We affirm the judgment of the district court.

We turn first to the contention that the defendant made a written acknowledgment of the debt on February 27, 1968, and therefore the statute ran from that time. § 25-216, R. R. S. 1943. The record shows that the defendant's wife was killed in an automobile accident on April 12, 1966, and that the defendant on February 27, 1968, acting as administrator of his wife's estate filed an objection to the claim. In his objection as administrator of the estate he alleged that a payment of $400 had been made in the year 1964 and that the proper amount of the claim should therefore be $8,600. The prayer of his objection stated as follows: "WHEREFORE, your administrator respectfully prays that this claim be allowed in the amount of $8,600.00 * * *." This contention must fall because there is no admission of personal liability on the defendant's part, and the admission, if any, was solely limited to his capacity while acting as administrator of his wife's estate. The admission of an executor or administrator is not receivable against him as a party in his personal capacity. 4 Wigmore on Evidence (3d Ed.), § 1076, p. 114. The following from 54 C. J. S., Limitations of Actions, § 318, p. 412, is pertinent: "An allowance by an executrix of a demand against the estate based on a promissory note executed by the executrix and the decedent tolls the statute as to the estate but not as against the executrix in her individual capacity." This principle has been applied in the exact situation present in this case. In

McKennon v. McKennon, 104 Okla. 228, 231 P. 91, 40 A. L. R. 24, the administratrix of an estate, also personally liable on a note, approved the note as a claim against the estate in the capacity of administratrix. When the administratrix was sued individually on the note, she invoked the statute of limitations as a defense and the court held that the approval of the claim in her capacity as administratrix did not bind the widow in any individual capacity and thus was not an acknowledgment of the debt. It seems clear, as a matter of original analysis, that an acknowledgment made while acting in an official capacity, is not an unequivocal acknowledgment of a debt owed by the party himself in his individual capacity. In France v. Ruby, 93 Neb. 214, 140 N. W. 175, this court set out the criteria for a written acknowledgment under this statute: " 'To remove the bar of the statute, the debtor must unqualifiedly acknowledge an existing liability.' * * * 'A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an "acknowledgment" as is contemplated by the statute. This must be an unqualified and direct admission of a present, subsisting debt on which the party is liable.' " The actions of the defendant were purely in an official capacity as administrator, and there was nothing in his acknowledgment which would constitute an admission of liability in a personal sense. There is no merit to this contention.

In order to avoid the bar of the statute the plaintiff further contends that promises were made to the plaintiff during the existence of a confidential relationship between the plaintiff and the defendant, who was her son-in-law. The inadequacy of this pleading is apparent. From an examination of the pleadings it is apparent that the plaintiff has merely alleged the existence of a confidential relationship by virtue of the fact that

the defendant is her son-in-law. The mere existence of this in-law relationship does not raise any inference of a fiduciary relationship or position of trust and confidence. To adequately raise such an issue as an issue of fact, some underlying and supporting facts must be alleged. The pleadings in this case entirely fail to do this. The mere allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact. 71 C. J. S., Pleading, § 27, p. 72; Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165; Meyer v. Linch, 145 Neb. 1, 15 N. W. 2d 317.

The plaintiff's case thus resolves itself into the assertion that the defendant's oral promises to pay are themselves sufficient to raise the estoppel. In support of this contention State Farm Mut. Auto. Ins. Co. v. Budd, 185 Neb. 343, 175 N. W. 2d 621, is relied upon. This reliance is misplaced. The Budd case involved a subrogation claim against the defendant's insurance company arising from an automobile accident. The plaintiff's insured, Garafalo, had been involved in a traffic accident with the defendant, who was insured by the Aetna Casualty & Surety Company. The plaintiff paid Garafalo for the damages to his automobile and was subrogated to his claim against the defendant. Upon notification of the claim, Aetna notified the plaintiff that it would not be in a position to honor the subrogation claim until the personal injury claim arising from the same accident was settled, and asked the plaintiff to wait until that time. Aetna maintained that position for over 3 years, until the statute of limitations had run and the claim was rejected. This court held that the defendant was estopped by the representations of his insurance company from asserting the statute of limitations. It appears that in the controversy between insurance companies, the plaintiff relied less on Aetna's promises to pay than upon its representations that, for internal administrative reasons, it would possibly prej-

udice settlement and be more convenient to dispose of the matter all at once, rather than in the piecemeal fashion proposed by the plaintiff. This was the situation with which the plaintiff was doubtlessly familiar and sympathetic. We do not believe the holding in this rather unusual case is properly applicable to an ordinary creditor-debtor relationship. In such a relationship the delinquent debtor will almost always make numerous assurances of payment. If such assurances alone were sufficient to estop the creditor, the purpose of the statute of limitations would be effectively circumvented. We hold that a naked oral promise to pay a debt will not, in the absence of fraud or a specific agreement not to take advantage of the statute of limitations, estop a defendant or debtor to plead the statute of limitations. See, Annotation, 24 A. L. R. 2d 1427; Annotation, 130 A. L. R. 32.

The decision of the district court is correct and is affirmed.

AFFIRMED.

DOLLY ROWEDDER, APPELLANT, V. ROYBERT L. ROSE ET AL., APPELLEES.
199 N. W. 2d 18

Filed June 23, 1972. No. 38212.

1. **Motor Vehicles: Negligence.** A left turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger.
2. **Motor Vehicles: Negligence: Trial.** When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented.
3. **Motor Vehicles: Negligence.** Driving at the speed defined by statute, when such definition sets a maximum speed and also

includes the requirement that such speed be reasonable and proper, having regard for the traffic, the use of the road, the condition of the road, and a requirement not to exceed a rate of speed such as to endanger the life or limb of any person, is not negligence in absence of other evidence indicating fault.

4. ———: ———. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case.

5. **Trial: Evidence: Appeal and Error.** The admission or rejection of photographs in evidence is largely within the discretion of the trial court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion.

Appeal from the district court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed.

Frederick S. Geihs, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

STUART, District Judge.

This is an action for personal injuries and property damage resulting from an automobile accident. At the conclusion of plaintiff's evidence, the trial court dismissed plaintiff's petition on motion of defendants and the plaintiff appeals.

The evidence shows that the collision occurred on May 27, 1969, at approximately 6:30 p.m. on U. S. Highway No. 136 about 6 miles east of Auburn. Plaintiff was riding in her automobile which was being driven easterly by her husband. They were proceeding to the farm home of plaintiff's niece, and at the point of collision were in the act of turning left into this farm driveway at the same time that the automobile owned by defendants Clifton, and being driven easterly by defendant Rose, was overtaking and passing plaintiff's car. The highway was a hard-surfaced roadway, 22 feet wide, with a painted centerline. Visibility was good and the roadway was dry. Prior to the accident,

the defendant Rose was traveling between 55 and 63 miles per hour, and plaintiff's automobile was "going slow." Plaintiff's automobile was in plain sight as defendant Rose overtook it for at least ¼ mile before the collision. Defendant Rose turned on his left-turn signal, moved into the left lane to pass plaintiff, and at this instant the plaintiff's automobile "veered over," defendant applied his power brakes, and the collision followed, the right front of defendants' automobile colliding with the left rear of plaintiff's automobile. Defendant Rose did not sound his horn. At the point of impact defendants' left front wheel was 3 feet south of the north edge of the paved portion of the highway and the plaintiff's left front wheel was 2 feet north of the centerline of the highway.

Five people witnessed the accident; the plaintiff, the plaintiff's husband, the defendant Rose, the defendant Laura A. Clifton (passenger in defendants' car), and Paul L. Edmonds, a disinterested witness who was following defendants' automobile four to six car lengths. All five testified either personally or by deposition. None of these witnesses testified that plaintiff's husband gave any indication of an intention to change direction or speed, either by a hand or arm signal, a signal light or a brake light. The uncontradicted testimony is that he began his left turn across the highway at a point not an intersection without any warning of any kind.

At the conclusion of plaintiff's evidence the trial court found as a matter of law that the proximate cause of the accident was the negligence of plaintiff's husband and that plaintiff's evidence failed to show that the acts of any of the defendants were a proximate cause of the accident.

The applicable statute provides: "(1) No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving * * * an ap-

propriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement; * * *. (2) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning; * * *." § 39-7,115, R. R. S. 1943.

This court has stated: "The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, the left-hand turn across a favored public highway between intersections is a particularly dangerous one. Legislatures have seen fit to regulate such movements and courts have required a degree of care commensurate with the danger. The language of our statute states that no person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving the statutory signal. In other words, the giving of the statutory signal is not enough, one must exercise reasonable care under all the circumstances. He cannot rely on holding out his arm and trust that all may see it. He must take reasonable precautions for his own safety and the safety of others before he undertakes a left turn between intersections where such movements are not anticipated." Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355.

Although plaintiff's husband testified, he was not asked whether or not he saw defendants' car or whether or not he signaled his intention to turn left. Therefore, he did not testify whether or not he observed the approach of defendants' automobile, which was in plain sight. Nevertheless, we think that this case properly comes under the rule enunciated in Petersen v. Schneider, *supra*, as follows: "Where the driver of a vehicle turning across a street or highway between intersections fails to look at all at a time and place where to look would be effective, or looks and negligently fails to see that which is plainly in sight, or is in a position

where he cannot see, a question for the court is usually presented."

Plaintiff complains of the speed of defendants' automobile. The applicable statute provides: "* * * no person shall operate a motor vehicle on any highway outside of a city or village * * * at a rate of speed greater than is reasonable and proper, having regard for the traffic, the use of the road, and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case at a rate of speed exceeding * * * sixty-five miles per hour between the hours of sunrise and sunset, and sixty miles per hour between the hours of sunset and sunrise, upon any concrete, brick, macadamized, or other hard-surfaced highway, or upon any other highway that is a part of the state highway system * * *." § 39-723, R. R. S. 1943.

The highway was hard-surfaced in good condition, the weather was clear and dry, visibility was good, and the time was between the hours of sunrise and sunset. Defendant Rose had no reason to anticipate any danger. It is entirely proper for one vehicle to pass another which is traveling in the same direction, and to do so the passing vehicle must be going faster than the vehicle being passed. The only evidence of defendants' speed was that it was between 55 and 63 miles per hour. This was not a negligent rate of speed under the circumstances shown.

Plaintiff complains that defendant Rose failed to sound his horn, and that this is evidence of negligence. "The duty to sound a horn or give a warning during the operation of a motor vehicle is not an absolute one. The duty in this regard depends upon circumstance." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. "One driving in the rear of another car has the right to assume that a motorist will obey the law of the road and is not bound to anticipate that a car will leave its proper side and cross the highway, at least where there is no intersection of public highways, and nothing to lead one in

the exercise of reasonable care to foresee such action." Petersen v. Schneider, *supra*. The evidence in this case fails to show any reason that defendant Rose should have anticipated the left turn, and therefore his overtaking and passing without sounding his horn is not evidence of negligence.

Plaintiff complains of the refusal to admit exhibits 14 to 25 in evidence. These exhibits appear to be photographs taken at some time after the accident. There was no foundation presented by the person taking the photographs. There was some indication that they may have been taken by plaintiff's attorney 5 days after the accident, but there was no evidence that the photographs offered were, in fact, those taken by plaintiff's attorney. The witnesses looking at the photographs were unwilling to state that the skid marks portrayed therein were those made at the time of the accident. "The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such ruling." Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628. Clearly plaintiff did not lay sufficient foundation for the admission of these exhibits.

The dismissal of plaintiff's petition by the district court was correct and is affirmed.

AFFIRMED.

ANDREWS ELECTRIC COMPANY, A CORPORATION, APPELLEE, V. FARM AUTOMATION, INC., A CORPORATION, APPELLANT.
198 N. W. 2d 463

Filed June 23, 1972. No. 38337.

1. **Statutes: Contracts: Account Stated: Account, Action on: Interest.** By statute (1) on money due on an instrument in writing or on settlement of an account from the day the balance shall be agreed upon, interest is allowed; and (2) unsettled

accounts bear interest after 6 months from the date of the last item.

2. **Statutes: Attorney and Client: Account, Action on: Interest.** By statute a party may recover prejudgment interest and an attorney's fee on a claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented the claim 90 days prior to commencement of suit. Compliance with the condition is mandatory.
3. **Appeal and Error: Trial.** The court in every stage of an action must disregard any error which does not affect the substantial rights of the adverse party. No judgment shall be reversed by reason of the error.
4. **Appeal and Error: Trial: Pleadings: Parties.** An appeal to the Supreme Court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit.

Appeal from the district court for Gage County: ERNEST A. HUBKA and WILLIAM B. RIST, Judges. Affirmed in part, and in part reversed and remanded with directions.

Ronald G. Sutter of Everson, Wullschleger, Sutter, Fischer & Muehlberg, for appellant.

Howard F. Ach of Ach & Ach, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Andrews Electric Company alleged two causes of action, one on an account stated and the other for the reasonable and agreed price of goods and services subsequently furnished Farm Automation, Inc. The latter in its answer denied generally and counterclaimed for damages for breaches of contracts upon which Andrews first cause of action rested. The court directed a verdict for Andrews on its causes of action, allowing the prejudgment interest and attorney's fees. It submitted part of Farm's counterclaim to a jury. The verdict went for Andrews.

Farm appeals. It limits its assignments of error to

Andrews first cause of action, arguing as follows: It is entitled to a jury trial on the issue of the existence of an account stated. In the alternative Andrews was not entitled to prejudgment interest or attorney's fees.

From 1964 to 1968 Andrews was a subcontractor of Farm, installing electrical wiring and equipment on premises of Farm's customers. On October 25, 1967, the parties signed an agreement, exhibit 1, as follows: The starting balance owed Andrews as of January 1, 1967, was $5,082.30. The balance due without reservation, addition, or subtraction was $3,935.99. Below that sum exhibit 1 listed five items totaling $2,001.03. Two were credit memoranda "to be issued" in the total sum of $321.40. The other three were: "Holding Leechs 419.63 . . . G. Holtmeier 760.00 . . . O. Meyer 500.00. . . ." After that itemization, receipt of $1,934.96 was acknowledged. The credit memoranda were issued October 26. In January 1968, Farm paid Andrews $500, the amount owing on the Meyer subcontract.

Officers of both parties testified that under exhibit 1 Farm was to pay Andrews upon completion of performance of the subcontracts. It was undisputed that performance by Andrews of all the subcontracts noted in exhibit 1 were not then completed. The date of completion of performance or a demand for payment subsequent to October 25 and prior to commencement of suit was not proved.

Suit had been filed June 30, 1969, and judgment was rendered April 21, 1971. Andrews on its first cause of action recovered the principal sum of $1,179.63, prejudgment interest from May 1, 1968, in the sum of $212.20, and $150 for services of its attorneys.

On the issue of interest, as well as of attorney's fees, the parties rely solely on statute. On money due on an instrument in writing or on settlement of an account from the day the balance shall be agreed upon, interest is allowed. Unsettled accounts bear interest after 6 months from the date of the last item. § 45-104, R.

R. S. 1943. A party may recover prejudgment interest and an attorney's fee on a claim of $2,000 or less for services rendered, labor done, or material furnished, provided he presented the claim 90 days prior to commencement of suit. See § 25-1801, R. S. Supp., 1969. Compliance with the condition is mandatory. See Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924 (1967).

The court in every stage of an action must disregard any error which does not affect the substantial rights of the adverse party. No judgment shall be affected by reason of the error. See § 25-853, R. R. S. 1943.

An appeal to the Supreme Court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit. Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924 (1967).

An account stated is a contract to pay the stated sum. It must ordinarily be set aside in order for the original claims upon which it is based to be tried. See, 6 Williston on Contracts (Rev. Ed., 1938), § 1864, p. 5238; cf. Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165 (1947).

Farm with a tenable argument requests us to plumb fathomless differences among open account, account stated, executory accord, and evidential admission. See, generally, 6 Corbin on Contracts, c. 72, pp. 233-90 (1962); 6 Holdsworth's History of English Law, pp. 650-51 (1924); 11 id. pp. 526-27 (1938); Jones, The Elizabethan Court of Chancery, p. 280 (1967); Restatement, Contracts, § 422 (1932); Williston, *supra*, §§ 1862-64, pp. 5227-38; Note, 14 Syracuse L. Rev. 653 (1963). We decline.

The assent of Farm to exhibit 1 was conditioned upon completion of performance by Andrews. Reviewing the record, especially Farm's counterclaim and the jury verdict, we conclude that the trial went on confused theories of open account, account stated, executory accord, and evidential admission. Apart from interest

and attorneys' fees, the material factual issue, stripped of form, related only to the Holtmeier subcontract. Specifically, it was the fitness of a device to control and meter the flow of grain, Farm having retained the device. That subcontract was indirectly a part of Andrews first cause of action. Although there was no account stated the finding for Andrews on the items of the account was not prejudicial error in view of the jury verdict.

The evidence is insufficient to prove presentation of the claim to Farm after performance and 90 days prior to commencement of the action. On the first cause of action the allowance of prejudgment interest and an attorney's fee was erroneous.

The judgment on Andrews first cause of action is reversed in part and the cause remanded with directions to disallow the items of interest prior to April 21, 1971, and attorney's fees. The judgment is otherwise affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

THE EXCHANGE BANK, GIBBON, NEBRASKA, A CORPORATION, APPELLEE, V. MID-NEBRASKA COMPUTER SERVICES, INC., A CORPORATION, ET AL., APPELLANTS.
199 N. W. 2d 5

Filed June 23, 1972. No. 38342.

1. **Mortgages: Pleadings: Evidence: Trial: Appeal and Error.** Where there is some circumstantial evidence which tends to support the allegation in a petition for the foreclosure of a mortgage that no proceedings at law have been had for the recovery of the debt, and no contrary showing is attempted, a decree of forclosure will not be reversed without a showing that the specific objection was called to the attention of the trial court and also that the defendant has been prejudiced by the omission of direct proof.
2. **Mortgages: Supersedeas: Bonds: Appeal and Error.** In appeal-

ing from a decree of foreclosure which orders the sale of land, the supersedeas bond should be conditioned as set out in subsection (3) of section 25-1916, R. S. Supp., 1971, and the amount of the pledge a matter of judicial discretion. In appealing from a decree of foreclosure which directs the payment of money and also orders the sale of real estate, the court may require a supersedeas bond in an amount computed as specified in subsection (1) and conditioned as provided in subsections (1) and (3) of said statute.

3. **Courts: Bonds: Appeal and Error.** An appellate court is required to permit the amendment of a defective appeal bond or to order the filing of a new bond in the furtherance of justice.
4. **Statutes: Courts: Bonds: Appeal and Error.** An appeal bond is within the purview of the statute which requires the court to disregard defects not affecting the substantial rights of the adverse party.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Knapp, Tarrell, State & Yeagley, for appellants.

Tye, Worlock, Tye, Jacobsen & Orr, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and LYNCH and MORAN, District Judges.

LYNCH, District Judge.

This is an action to foreclose two separate mortgages on the same property. The defendants filed a general denial. The plaintiff proved execution of the notes and mortgages, defaults, and amounts due. The instruments were received in evidence and canceled and merged in judgment. Defendants' counsel cross-examined only as to amounts due and interest and offered no testimony. A decree in proper form was entered which included findings that certain amounts were due to plaintiff. The defendants' motion for new trial, based upon four general allegations of error, was overruled. At an ex parte hearing in chambers, defendants' counsel tendered a supersedeas bond conditioned pursuant to subsection (3) of section 25-1916, R. S. Supp., 1971. The court required a bond under subsection (1) of that statute.

On appeal the defendants contend that: (1) There was not competent evidence to support the allegation that no proceedings at law had been instituted for the recovery of the debts; and (2) the court erred in requiring a bond pursuant to subsection (1) of section 25-1916, R. S. Supp., 1971.

Concerning defendants' first argument, the case of Nielsen v. Central Nebraska Land & Investment Co., 87 Neb. 518, 127 N. W. 897, is controlling: "If there is some circumstantial evidence which tends to sustain the allegation in a petition for the foreclosure of a mortgage that no proceedings at law have been had for the recovery of the debt, and nothing appears to show that the defendant has been prejudiced by the omission of direct proof, this court will observe the provisions of section 145 of the code, and the judgment will not be reversed merely by reason of such defect." Section 145 of the code is now section 25-853, R. R. S. 1943.

Dicta in the Nielsen case states: "The allegation is negative in its nature, and we have said that where there is some evidence tending to support the allegation, and no contrary showing is attempted, a decree of foreclosure will be affirmed." Also, "The record fails to show that this objection was called to the attention of the district court. No error affecting defendants' substantial rights is apparent."

In the instant case there was some circumstantial evidence tending to support the negative allegation in the petition; there was no contrary showing attempted; there was no proof of prejudice; and the objection was not called to the attention of the trial court. Therefore, this assignment of error is not well taken. All of defendants' citations are distinguishable.

In support of their second assignment of error, the defendants rely solely upon section 25-1916, R. S. Supp., 1971, and the case of Kountze v. Erck (1895), 45 Neb. 288, 63 N. W. 804, which was an appeal from an order confirming the sale of real property. In that case the

court held that: "* * * the penalty of a supersedeas bond on appeal from the order of confirmation is not required to be double the amount of the deficiency judgment, but must be in such sum as the court or judge shall fix, and conditioned as prescribed by the third subdivision of section 677 of the Code of Civil Procedure." Section 677 of the code is similar to the present section 25-1916, R. S. Supp., 1971. The court further stated: "The defendant has not appealed, nor attempted to do so, from the amount of the deficiency judgment, but merely from the order confirming the sale of the mortgaged premises, which order does not direct the payment of any sum of money whatever. It is true a deficiency judgment was rendered in the case at the same time, but the defendant had a perfect right to have either or both reviewed at his election." In the case of State ex rel. Baker v. Baxter (1903), 4 Neb. Unoff. 869, 96 N. W. 647, the court held: "Where a decree awards the plaintiff a personal judgment against the defendants and also directs the sale of pledged property by way of foreclosure, the defendants may supersede that portion of the decree providing for foreclosure of the pledge without superseding the money judgment."

In 5A C. J. S., Appeal and Error, § 1635, p. 188, it is stated: "The exercise by the trial court of its discretion with respect to * * * fixing the terms and conditions of a supersedeas bond, will not be interfered with on appeal unless there has been a manifest abuse of discretion or injustice has resulted."

In State v. Kidder, 169 Neb. 181, 98 N. W. 2d 800, this court held: "A defective appeal bond which has been approved by the court rendering the judgment confers jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit an amendment of the bond or to order the filing of a new bond in the furtherance of justice."

It is concluded that in superseding a decree of fore-

closure which orders the sale of land, the bond should be conditioned as set out in subsection (3) of section 25-1916, R. S. Supp., 1971, and the amount of the pledge or penalty a matter of judicial discretion; and, in appealing from a decree which directs the payment of money and also orders the sale of real estate, the trial court may require a supersedeas bond in an amount computed as specified in subsection (1) and conditioned as provided in subsections (1) and (3) of the statute.

In the instant case it appears that defendants appealed from the money judgments and the order of sale. There has been no showing of prejudice or abuse of discretion either as to the amount or the conditions of the bond. A copy of the supersedeas bond is not included in the record; however, if it does not contain the conditions prescribed in subsection (3) of section 25-1916, R. S. Supp., 1971, it should be amended if requested by the plaintiff.

Applicable to both aspects of defendants' appeal is section 25-853, R. R. S. 1943, which requires the court to disregard defects not affecting the substantial rights of the adverse party. The case of Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, holds that, "* * * an appeal bond undertaking is within the purview of the statute."

The judgment of the trial court is affirmed. Defendants directed to amend bond if requested by plaintiff.

AFFIRMED.

IN RE INTERESTS OF CHENA V. JOHNSON AND DONDI T. JOHNSON, CHILDREN UNDER EIGHTEEN YEARS OF AGE. MICHAEL T. HEALEY, APPELLEE, V. INGRID Y. JOHNSON, APPELLANT.

198 N. W. 2d 466

Filed June 23, 1972. No. 38381.

1. **Infants: Parent and Child.** A neglected child is a child under

18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.

2. **Infants: Statutes.** The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purposes of serving the best interests of the children involved.
3. **Infants: Parent and Child: Trial: Appeal and Error.** In cases involving child custody determinations in juvenile court and other courts, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

Samuel J. Turco of Seminara, Caniglia, Meazell & Turco, for appellant.

Donald L. Knowles, Colleen R. Buckley, and Roger R. Holthaus, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action brought in the juvenile court of Douglas County, Nebraska, in the interests of Chena V. and Dondi T. Johnson, who were then respectively 3 and 1 years of age. They are children born to appellant Ingrid Y. Johnson out of wedlock by different fathers. The trial court found the children to be neglected, terminated all parental rights, and committed the children to the Department of Public Welfare of the State of Nebraska. We affirm the judgment of the juvenile court.

The fathers of the children, subsequent to their birth, displayed no interest in them, and did not contribute to their support. Appellant received Aid to Dependant Children funds, was consistently unemployed, and had no other means of sustaining herself and the children.

The home was inadequately furnished, due, not to lack of funds, but to indifference on the part of appellant. It was also very filthy and odorous. There was a failure to provide the children with adequate or sufficient clothing. The children were frequently left in a locked apartment without adult supervision other than a request to neighbors to look in on them occasionally. These instances covered various periods of time and on one occasion the appellant told a neighbor she would only be gone 20 minutes and failed to return for 3 days. Appellant served 10 and 30-day stretches under confinement in the county jail, apparently for petit larceny. The record is not entirely clear with reference to the whereabouts of the children on these occasions, but the inference is that they were in the custody of appellant's sister in the apartment and under the conditions above described.

Appellant contends the decision of the juvenile court is not supported by the evidence. The following rules appear to be applicable. "A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child." Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361.

"The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purposes of serving the best interests of the children involved. * * *

"In cases involving child custody determinations in juvenile court and other courts, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence." State v. Randall, 187 Neb. 64, 187 N. W. 2d 586.

The evidence reflects that representatives of the Douglas County Welfare Office had been working with appellant for many months in an effort to improve the lot of these children. Such efforts were unavailing and there is no reason to assume that conditions would be improved in the future if the children were left with their mother. The children have clearly been neglected and it is definitely in their interests that they be provided with more acceptable care and surroundings. The findings and order of the juvenile court are not unreasonable and there has not been an abuse of discretion.

We find it to be in the best interests of the children to affirm the judgment of the juvenile court.

AFFIRMED.

VACANTI & RANDAZZO CONSTRUCTION COMPANY, A CORPORATION, APPELLEE, V. H.I.E. FOOD PRODUCTS, INC., ALSO KNOWN AS HOUSE OF ALBERT'S, INC., APPELLANT, IMPLEADED WITH RONALD M. ALBERT, APPELLEE.

198 N. W. 2d 468

Filed June 23, 1972. No. 38402.

Pleadings: Time: Judgments. The fact alone that an answer was filed 10 days after answer day without leave of court is not a sufficient ground for thereafter entering a default judgment against the defendant.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded.

Carl I. Klekers and William H. Mecham, for appellant.

Frank Meares, for appellee Vacanti & Randazzo Constr. Co.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The district court rendered a judgment by default

against defendant H.I.E. Food Products, Inc. The latter on appeal asserts the court erred in denying defendant leave to answer out of time and in rendering the judgment.

On July 9, 1971, plaintiff filed its petition alleging "waste" and nonpayment of rent of $2,050 a month from March 1 through August 1, 1971, on a written lease. The term of the lease was 15 years from September 1, 1969. Plaintiff prayed for judgment of $419,856 under an acceleration clause and for a writ of restitution. On August 26, 1971, 10 days after answer day on an alias summons, counsel for defendant without leave of court filed an answer with certificate of service on counsel for plaintiff. The answer was a general denial. On September 2, 1971, plaintiff moved to strike the answer.

At a hearing on October 14, 1971, counsel for defendant moved for leave to file an amended answer and tendered his affidavit of even date. The affidavit stated as follows: Defendant was "legally nonexistent" and its president in Florida. Counsel notified him of the suit by letter dated July 23, 1971. The travel schedule of the president and delays in the mail resulted in counsel's receiving a reply on August 20, 1971, by letter dated August 12, 1971. The amount due for rent was undetermined and unascertainable on October 14, 1971. Plaintiff had retaken possession of the property and had failed to mitigate damages. The premises "could be reletted to another tenant." See Bernstein v. Seglin, 184 Neb. 673, 171 N. W. 2d 247 (1969). Counsel did not tender a formal answer.

At the hearing counsel for plaintiff mistakenly said that answer day had been July 9, 1971. The court denied defendant's motion outright, declining to grant leave to answer on reasonable conditions; and it sustained a motion of plaintiff to strike the purported answer. It found defendant in default and proceeded to take evidence in the form of a statement by counsel

for plaintiff concerning the amount of the judgment. Counsel for plaintiff stated that the total amount due was $419,856. Counsel for defendant inquired, "Is it possible to cross-examine . . . (counsel for plaintiff)." The court replied, "No, you are not in Court." Judgment in that amount was then rendered.

Counsel for defendant answered without leave of court 10 days after answer day but the court had not adjudged a default. Such a mistake without more is insufficient to warrant a default judgment subject to these conditions: A good defense is pleaded or proved, and no unfair prejudice will result from the grant of a trial on the merits. Cf. Beliveau v. Goodrich, 185 Neb. 98, 173 N. W. 2d 877 (1970).

The rulings and judgment constituted an abuse of discretion. The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN RE INTERESTS OF PATRICK MICHAEL HARTMAN ET AL. MICHAEL T. HEALEY, APPELLEE, V. NANCY HARTMAN APPELLANT.

199 N. W. 2d 26

Filed June 30, 1972. No. 38190.

1. **Parent and Child: Infants: Words and Phrases.** A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.
2. **Parent and Child: Infants: Trial: Evidence: Appeal and Error.** In cases involving child custody and determinations in juvenile court the findings of the trial court, both as to the evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion.

3. **Parent and Child: Infants: Trial: Evidence.** A court may terminate parental rights when it finds such action to be in the best interests of the child and it appears from the evidence that the parent has substantially, continuously, and repeatedly neglected the child and refused to give the child the necessary parental care and protection.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

Spielhagen, Matejka & Spielhagen, for appellant.

Donald L. Knowles and Colleen R. Buckley, for appellee.

Heard before WHITE, C. J., SPENCER, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an appeal from the separate juvenile court of Douglas County in which the court terminated the parental rights of the appellant natural mother of the five minor children involved and held that it was to the best interests of the minor children that they be awarded to the care and custody of the Department of Welfare, State of Nebraska, and that the said Department of Welfare should have authority to consent to the legal adoption of said children. We affirm the judgment and order of the court.

The essential question involved in this case is the determination of fact as to whether the children involved were "neglected" children within the meaning of the statutory definition in section 43-201, R. R. S. 1943, which provides as follows: "Neglected child shall mean any child under the age of eighteen years * * * whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child." This court has recently defined the meaning in this statute in Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361, by reiterating

the position that was taken in State v. Best, 173 Neb. 483, 113 N. W. 2d 650. In the Mullikin case, we held as follows: "A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child."

A detailed review of the evidence is not necessary in this opinion. We will review the pertinent facts supporting the court's judgment. The evidence shows that the Omaha police and a caseworker for the Douglas County Social Services entered the home of the appellant; found it in complete disorder; found that there were firearms and ammunition within easy reach of all five of the children; that prior to the time they entered the home, the caseworker observed one of the minor children of the appellant playing naked in front of the home; that at the time they entered the home they found the appellant was not at home, and when the caseworker returned with the police they did not find any parent present nor anyone purporting to be in charge of the children. This general testimony was cumulatively corroborated by the most convincing type of evidence. It demonstrates that the entire interior of the home was littered with clothing, old furniture, dirt, and filth; that the five children were in various states of undress; that the kitchen was not only in a state of disorder but there appeared to have been a recent fire in the kitchen area; and that one of the older children was attempting to prepare some food for the younger children. The refrigerator was disconnected and the food therein was spoiled. The authorities were unable to get into the basement area and down the steps due to the litter consisting of clothing, junk, and boxes. Attempts to locate the appellant were futile and it became immediately necessary to take the children into pro-

tective custody. The evidence also indicates that some of the children were peculiarly in need of constant care. One of them was retarded. The appellant had been advised that there were special services available for treatment of retarded youngsters, but she did not register her child for the services available. One of the teachers of the Hartman children testified that during the period of attendance in school their clothing and bodies were dirty; and that on many occasions this condition was brought to the attention of the appellant but there was no substantial improvement in their condition. There were also problems of nonattendance in school with reference to Patrick and Diane which were brought to the attention of the appellant. The evidence in this case almost conclusively shows not only a continuing neglect, but attention far short of the normal standards for caring for children of tender years, and also shows either a refusal or a failure to do anything about the conditions when they were called to the appellant's attention by the authorities. Much of the testimony of the State was corroborated by one of the children, Patrick Hartman, age 11, who also testified that on the date in question, when the investigation was made by the authorities, he did not know the whereabouts of his mother, the appellant; that she had left the evening before and had not returned; that he did not attend school because of this and remained home attempting to take care of his younger brothers and sisters; and that he had little or no contact with Thomas Hartman, his father.

There is no denial of the facts testified to by the State's witnesses, and we may generally characterize the appellant's testimony as being an appeal to the sympathy of the court because of the separation from her husband and the hardships of maintaining a home under the conditions of poverty and strain usual in this situation. She concedes that her home was "very much a mess" and that she had left the home on May 20, 1970, and did not return until May 22, 1970, at about 3 a.m.

The court, in spite of this overwhelming evidence of neglect, continued this case from January 15, 1971, at the request of the appellant, until March 19, 1971. Again the appellant was ordered to be prepared by March 19, 1971, to show cause why her parental rights should not be terminated. The patience of the court in this situation is commendable. Again, the court did not make a final determination of the matter until April 21, 1971, when, after hearing further testimony, it finally came to the conclusion that both the appellant's and the father's rights should be terminated and ordered the children placed with the Department of Public Welfare for adoption.

It requires no argument or detailed analysis of the evidence to come to the conclusion that the court was correct in exercising its discretion and finding that these five children were neglected within the meaning of the statute. We have recently held in cases involving child custody and determinations in juvenile court that the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion. Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544. It is quite plain in this particular case that the court would have been derelict in its duty had it not made the determination of neglect that it did.

The appellant contends that her parental rights, in spite of the conclusive evidence of neglect, should not have been completely terminated. A court may terminate parental rights when it finds such action to be in the best interests of the child and it appears from the evidence that the parent has substantially, continuously, and repeatedly neglected the child and refused to give the child the necessary parental care and protection. Healey v. Naimie, 187 Neb. 494, 192 N. W. 2d 137; Mingus v. Stuchlick, 185 Neb. 139, 174 N. W. 2d 194; Hubbard v. Loewenstein, 181 Neb. 96, 147 N. W. 2d 164.

We find no abuse of discretion by the court in com-

ing to the determination that it did to terminate the parental rights. Particularly persuasive in this respect is not only the nature of the neglect by the appellant of her children, but that she continuously failed or refused to give the children necessary parental care and protection when it was called to her attention by the authorities and other persons. Not only has the appellant shown her unfitness but she has also shown that she has not substantially altered her course of conduct. The findings and the determination of the court that parental rights should be terminated are without error.

The judgment of the separate juvenile court is correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. SAMMY HOWELL, APPELLANT.

199 N. W. 2d 21

Filed June 30, 1972. No. 38316.

1. **Appeal and Error: Time: Judgments.** Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.
2. **Post Conviction: Trial: Evidence: Pleadings.** In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
3. **Criminal Law: Pleadings: Evidence: Appeal and Error.** When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof.
4. **Criminal Law: Motions, Rules, and Orders: Evidence.** A failure to move for the suppression of evidence seized unlawfully waives the objection.
5. **Criminal Law: Trial: Evidence: Appeal and Error.** When the evidence of guilt is clear and the exclusion of erroneous evi-

dence obviously would not have resulted in a different verdict, the admission of such evidence is harmless error.

Appeal from the district court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

Brock & Seiler, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and LYNCH and MORAN, District Judges.

NEWTON, J.

This is a post conviction proceeding. Defendant alleges he was wrongfully denied the right to appeal from his conviction and the admission of constitutionally inadmissible evidence. We affirm the judgment of the district court overruling the motion to vacate the judgment of conviction.

Defendant was convicted on two counts of unlawfully giving or delivering L.S.D. He was represented by privately employed counsel. Motion for new trial was overruled on August 7, 1970, and defendant was sentenced to serve 2 to 3 years in the Nebraska Penal and Correctional Complex on each count. Sentences were to run concurrently. Defendant states that after confinement, but within the time allowed for appeal, he prepared the necessary papers to effect an appeal, and delivered them to the proper prison authority, but they were not properly forwarded until after the time for appeal had expired. The notice of appeal and accompanying instruments were filed on September 23, 1970. Defendant's allegation of unreasonable delay is not borne out by the instruments filed. The praecipe for a bill of exceptions is dated September 11, 1970, and the jurat on an accompanying affidavit bears the date of September 14, 1970. No reason is given by defendant for not having had his attorney appeal the case. "Where a notice of appeal is not filed within 1 month from the

entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed." State v. Pauley, 185 Neb. 478, 176 N. W. 2d 687.

The defendant has failed to allege or prove facts indicating that he is acting in good faith and that his appeal has merit. The following rules appear to be pertinent. "In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.

"* * * When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof." State v. Myles, 187 Neb. 105, 187 N. W. 2d 584.

As justification for an appeal and for the purpose of raising another constitutional issue, defendant alleges the wrongful admission of one item of evidence. A warrant to search defendant's automobile for narcotics had been issued. No narcotics were found but the contents of the automobile, apparently comprising all of defendant's personal effects, were inventoried. A pamphlet or book on drug awareness which described various drugs and their effects was offered in evidence. The book had been obtained from defendant's automobile and was not within the description of articles authorized to be seized under the search warrant. No motion to suppress this evidence was made, either before or during trial, on the ground that it was obtained as the result of an unlawful search. Counsel did object to its introduction on the ground that it was hearsay, irrelevant, immaterial, incompetent, and without foundation. It was received for the limited purpose of showing that defendant knew the nature of the drugs he was charged with giving or delivering. The objections made were without validity although use of the book in evidence would appear to have been vulnerable to a motion to suppress on the ground of unlawful seizure. A failure

to move for the suppression of evidence seized unlawfully waives the objection. See § 29-822, R. R. S. 1943. See, also, Robinson v. United States, 327 F. 2d 618 (8th Cir., 1964).

Furthermore, the book appears to have been innocuous. It is educational in nature and of a type used to inform people of the harmful effects of certain drugs. Anyone might innocently possess such a book and gain possession of the knowledge it imparted. Had a motion to suppress been made and erroneously rejected, it would not have been grounds for reversal when the nature of the book is considered together with the clear evidence of guilt disclosed by the record. When the evidence of guilt is clear and the exclusion of erroneous evidence obviously would not have resulted in a different verdict, the admission of such evidence is harmless error. See Schneble v. Florida, 405 U. S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (March 21, 1972).

We affirm the judgment of the district court.

AFFIRMED.

MORAN, District Judge, concurs in result.

ALBERT BELL, APPELLANT, V. THEODORE JANING, APPELLEE.
199 N. W. 2d 24

Filed June 30, 1972. No. 38326.

Extradition: Time: Arrest. The illegality of a prisoner's custody prior to the issuance of a rendition warrant from a sister state does not render the warrant void and unenforceable.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Frank B. Morrison, Sr., and Stanley A. Krieger, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an appeal from a denial of relief in a habeas corpus case. The question involved is whether the illegality of the appellant's custody prior to and at the time of the Governor's issuance of a rendition warrant honoring a request from a sister state renders the warrant void and unenforceable. The district court found that it did not, and we affirm the judgment of the district court.

Only the facts necessary for our disposition of this case will be recited in this opinion. The appellant was arrested on May 23, 1971, as a fugitive from justice. Under sections 29-743 and 29-745, R. R. S. 1943, of the Uniform Criminal Extradition Act, the appellant became entitled to release from custody on August 21, 1971, the date on which 90 days had elapsed which is the limit of legal detention under the statute. The appellant remained in custody until August 24, 1971, between 2 and 3 days after he was entitled to release. During this period of time, the Governor of the State of Nebraska received a rendition warrant from a sister state, which was served and the appellant's confinement by the State was continued pursuant to the authority of the rendition warrant.

We must assume, in deciding this case, that the State's custody of the appellant was unlawful during some or all of the time after August 21, 1971. It is obvious that during this very short period of time the appellant would have been entitled to release under the statute on a writ of habeas corpus. The question presented to us though is not the propriety of the custody during this period of time. We are confronted with the question of the propriety of the custody after the State's receipt of the rendition warrant. The decisions and authority in this situation are clear. In a decision on

facts substantially identical to those before the court here, the federal court held, in Lott v. Heyd, 315 F. 2d 350, as follows: "Assuming that the appellant was held for three days without legal authority, no federally-protected rights were violated and to hold that Louisiana's alleged misbehaviour deprived Mississippi of its Constitutional right to the fugitive would amount to allowing the State of Louisiana to amend the Constitution." Further cumulative authority precisely in point is found in Gummow v. Larson, 35 Ill. 2d 280, 220 N. E. 2d 165; State v. Hedman, 280 Minn, 69, 157 N. W. 2d 756; Lombardo v. Tozer (Mo.), 264 S. W. 2d 376; Cohen v. Warden, 252 F. Supp. 666.

It is clear that the cited sections of the Uniform Criminal Extradition Act are to prevent an unreasonable lengthy period of confinement of fugitives pending consummation of extradition proceedings by the demanding state. It is clear that they are entitled to the writ of habeas corpus to enforce the provisions of these sections of the statute. It is even more clear, however, that there is no indication, either under the Constitution of the United States or of any legislative intent to restrict the period within which a sister state may issue a rendition warrant to apprehend a fugitive and to make him respond to criminal proceedings in the sister state. There is no merit to the appellant's contention.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

MARGARET RAMBO, APPELLANT, V. DONNA M. GALLEY ET AL., APPELLEES.

199 N. W. 2d 14

Filed June 30, 1972. No. 38385.

1. **Equity: Appeal and Error.** When an action in equity is appealed it is the duty of this court to try the issues de novo and to

reach an independent conclusion without reference to the findings of the district court.

2. **Equity: Appeal and Error: Evidence.** Where in an action in equity, the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
3. **Contracts: Damages: Employer and Employee.** While the measure of damages in an action for the breach of an agreement by an employee not to enter business in competition with the employer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact.
4. **Contracts: Damages: Evidence.** In an action for breach of contract, the plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum.
5. **Contracts: Damages.** The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach.
6. **Contracts: Employer and Employee.** In the absence of special circumstances, it is beyond question that an employee, unless contractually prohibited, may upon the termination of his employment, compete with his former employer either on his own or on another's behalf.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

William H. Mecham, for appellant.

Lathrop, Albracht & Dolan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an appeal from the dismissal of an action by Margaret Rambo, plaintiff, owner and operator of an employment agency, against a former employee, Donna

M. Galley, Ralph W. Knapp, her husband, and Personnel Placement, Inc., for an injunction restraining defendants from operating an employment agency in competition with plaintiff, and for damages. We affirm.

Plaintiff opened her employment agency in April of 1966. She hired the defendant, Donna Galley, as an interviewer, in November of 1968. Donna left her employ April 17, 1969. Personnel Placement, Inc., was incorporated in March 1969. It was financed by the defendant Knapp, who subsequently married Donna, and conveyed one-half interest in the corporation to her. Personnel Placement, Inc., opened for business on April 21, 1969, under the management of Donna.

Plaintiff testified that when she hired Donna, although the employment contract was oral, Donna signed an agreement she would not enter the employ of another agency nor open an agency of her own within a 150-mile radius of Omaha for a period of 1 year from the termination of her employment. Donna specifically denies signing any such agreement. Plaintiff further testified that when she heard Donna had opened a competing employment agency she looked for the file containing the agreement in question but the file had disappeared.

Plaintiff's former husband testified that he had seen an agreement not to compete bearing Donna's signature; and that he was able to recognize her signature because he had seen it daily for months. When three signatures were produced in court, with the request that he identify Donna's signature, he was unable to do so. Two of plaintiff's former employees who were there during the period of Donna's employment testified that they had signed such agreements. One was requested to sign a new one after Donna left. One of these employees testified that in a subsequent conversation with Donna, Donna denied that she had ever signed such an agreement.

The contract form used by Personnel Placement, Inc., is identical with the one used by plaintiff. There is little

question the new corporation made use of plaintiff's forms. Plaintiff's testimony would also indicate that at the time Donna left her employ, she took with her all of the applications which she was then processing. This Donna denies. Two of Donna's placements during the last week in April were unprocessed applicants of plaintiff's agency at the time of the termination of Donna's employment. Donna testified these applicants came in response to an ad. Donna concedes that among the employers she contacted there were some she had contacted while in the employ of the plaintiff, because she contacted all possible employers, using the yellow pages of the telephone directory. Plaintiff had no exclusive contracts with any of these employers. The customary procedure for any agency is to call employers about possible vacancies.

Plaintiff did not produce her records, but in an attempt to establish damages testified as to her income for the period from 1966 through 1970. Her testimony on gross and net income for that period was as follows:

	GROSS INCOME	NET INCOME
1966	$ 9,640	$ 1,000.00
1967	21,347	4,563.19
1968	49,503	13,000.00
1969	51,740	- 2,000.00
1970	60,000	16,000.00

Plaintiff's advertising expense for 1966 through 1969, was as follows:

1966	$ 3,000
1967	3,600
1968	9,700
1969	16,000

In 1969, plaintiff's rent was increased over 1968, and because she hired additional personnel, her payroll increased approximately $4,000.

Donna, during the 5 months of her employment with the plaintiff, became familiar with plaintiff's procedures and with some of plaintiff's clientele. It is undisputed

that the business is a very competitive one. Within a brief period after Donna left plaintiff's employ, 10 to 15 other new employment agencies entered the field.

If Donna signed an agreement not to compete for a period of 1 year, it would be enforceable. Personal Finance Co. v. Hynes (1936), 130 Neb. 547, 265 N. W. 541. The question is whether or not there was such an agreement. The testimony of the parties is conflicting and irreconcilable. The inference to be drawn from plaintiff's testimony is that the agreement is unavailable because Donna removed the file which contained those agreements from plaintiff's office. The trial court observed the witnesses, heard their testimony, and found the evidence insufficient to prove the existence of the agreement.

Our law is well settled that when an action in equity is appealed it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Where in such case the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Satterfield v. Dunne (1966), 180 Neb. 274, 142 N. W. 2d 345. This we do herein.

In any event, the trial court properly sustained the motion to dismiss the action for the reason that plaintiff failed to adduce sufficient evidence of damages to sustain a recovery. The rules of law applicable herein were well stated in Gallagher v. Vogel (1953), 157 Neb. 670, 61 N. W. 2d 245: "While the measure of damages in an action for the breach of an agreement by the seller not to re-enter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact.

"In such an action, the plaintiff will be called upon,

in order to recover substantial damages, to furnish such data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum.

"The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach."

These rules are equally applicable to a contract not to compete, executed by an employee.

We assume it to be plaintiff's contention that she would have had a much greater increase in gross income and a profit in 1969, except for the fact that defendants started a competing agency. There is no way, from the evidence, to tell what this increase might have been. Plaintiff did not put her records in evidence. It is not even possible for comparison purposes to determine what plaintiff's gross income was for the 3½ months in 1969, covering Donna's employment.

Plaintiff adduced some testimony as to what a large national employment agency might charge to franchise an operation such as the defendants. This evidence clearly was immaterial on the issues herein. We agree with plaintiff that damages in these cases are not easily susceptible of accurate proof. However, there must be sufficient evidence to enable the court, with a certain degree of exactness, to estimate plaintiff's damages. Expressed generally, the criterion must include the value of the business lost to the plaintiff, which could be gains prevented as well as losses sustained. However, there is no evidence which might indicate what that figure could be. Plaintiff increased her gross income during 1969. Whether that increase might have been greater except for Donna entering a competing agency is pure speculation on this record. While plaintiff said she sustained a $2,000 loss during the year, her testimony also

is that she considerably increased her advertising expense, her rent, and her payroll. These figures compared to the previous year were sufficient to account for a deficit.

Defendants were in competition with the plaintiff for approximately 8 months in 1969. Yet there was no evidence adduced of gross or net income, or of expenses broken down into monthly periods for 1969. We assume plaintiff's business records would have readily revealed this information, but they are not available to us. It is entirely possible that with increased expenses the net income was diminishing during the early part of 1969. There is evidence that Donna was dissatisfied with her income from the plaintiff. In the absence of special circumstances, which do not exist herein, it is beyond question that an employee, unless contractually prohibited, may upon the termination of his employment, compete with his former employer either on his own or on another's behalf. See Annotation, 28 A. L. R. 3d, § 3, p. 25.

On the record before us, even if Donna had executed an agreement not to compete, the most that could be allowable herein would be nominal damages for its breach. Plaintiff has failed to sustain her proof on damages. The judgment of the district court is affirmed.

AFFIRMED.

ROBERT E. STEPHENS, APPELLANT, V. THEODORE JANING, APPELLEE.

199 N. W. 2d 25

Filed June 30, 1972. No. 38399.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Frank B. Morrison, Sr., and Stanley A. Krieger, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This case is identical to Bell v. Janing, *ante* p. 690, 199 N. W. 2d 24, and is controlled by the holding therein.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. MCCLELLAND, APPELLANT.
199 N. W. 2d 11

Filed June 30, 1972. No. 38426.

1. **Criminal Law: Time: Continuances.** An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error.
2. **Criminal Law: Venue.** The granting of a change of venue rests in the sound discretion of the court.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The defendant, Charles E. McClelland, was found

guilty by a jury of unlawfully assaulting, threatening, and detaining two guards for the purpose of compelling or inducing the performance of an act by another person. § 28-743, R. R. S. 1943. The defendant appeals. We affirm the judgment and sentence of the district court.

This is a companion case to State v. Eckstein, *ante* p. 146, 195 N. W. 2d 194. The defendant and Eckstein, both inmates of the Nebraska Penal and Correctional Complex, were joint participants in the commission of the offense. The defendant here contends, as the defendant did in State v. Eckstein, *supra*, that the penalties provided by section 28-743, R. R. S. 1943, are in violation of the Eighth Amendment to the Constitution of the United States and are cruel and unusual. He also contends that section 28-743, R. R. S. 1943, is void for vagueness and providing for an unreasonable classification. These contentions were effectively disposed of in our opinion in State v. Eckstein, *supra*, and will not be repeated here. There is no merit to these contentions.

The defendant asserts that his motion for continuance should have been sustained. The record shows that the defendant was charged with the crime herein on September 28, 1970. His motion for continuance was filed on September 15, 1971. The grounds for the continuance are that the attorney for the defendant, who had already represented Eckstein, desired time so that he might obtain a record of the testimony of the witnesses at the Eckstein trial, who were to be the same witnesses who would testify against the defendant in the case at bar. The record in this case fails to show that the trial court abused its discretion in overruling his motion for continuance on this ground. The opportunity for preparation for trial is not unlimited, and there is nothing in the record to demonstrate any prejudice or an invasion of any right on the part of the defendant's counsel to prepare for possible impeachment of the prosecution's witnesses. An application for postponement of time of

trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. State v. Peterson, 183 Neb. 826, 164 N. W. 2d 649; State v. Meadows, *ante* p. 287, 196 N. W. 2d 171. There is no merit to this contention.

The defendant also contends that he should have been granted a change of venue. A voir dire examination of the jurors in both the Eckstein case and this one demonstrates affirmatively that none of them knew the defendant and they had no recollection of the incident to the extent that it would interfere with their duties as jurors. No juror had a recollection of the names of any persons involved and in this case all of the jurors were specifically asked whether they knew the defendant, Charles E. McClelland, and each juror stated that he did not. The granting of a change of venue rests in the sound discretion of the court and there is no showing of an abuse of discretion in this respect. There is no error in the ruling. Argabright v. State, 62 Neb. 402, 87 N. W. 146; State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

IN RE DRAINAGE DISTRICT NO. 10 OF KEARNEY COUNTY, NEBRASKA.

DRAINAGE DISTRICT NO. 10 OF KEARNEY COUNTY, NEBRASKA, ALSO KNOWN AS LOST CREEK DRAINAGE DISTRICT, APPELLANT, V. RUTH CANADAY ET AL., APPELLEES.

199 N. W. 2d 385

Filed July 7, 1972. No. 38083.

1. **Res Judicata: Estoppel.** A variable in issue preclusion is identity of issues in the two trials.

2. **Drains and Drainage Districts.** Exactness of apportionment of benefits among landowners in a drainage district is impossible.
3. **Appeal and Error: Rules of Court: Default.** Failure of an appellee to file a brief in this court is not a concession of error. The record and the brief of appellant must be considered.
4. **Appeal and Error: Drains and Drainage Districts: Trial.** Upon appeal to district court from a decision of the board of supervisors of a drainage district, all original objections made to the classification and assessment of benefits are heard and determined in a summary manner as in equity, and upon appeal to this court the cause is tried de novo.
5. **Appeal and Error: Witnesses: Evidence: Drains and Drainage Districts.** When, as required by statute, the district engineer has examined the land and made his report to the board of supervisors of the drainage district which has approved the report, the report furnishes prima facie evidence of the classification and benefits, and in the absence of fraud, such evidence is sufficient to sustain the decision of the board unless the decision is overcome by competent evidence to the contrary.

Appeal from the district court for Kearney County: EDMUND NUSS and NORRIS CHADDERDON, Judges. Affirmed as modified.

Meier & Adkins, for appellant.

Person, Dier & Person, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON JJ.

PER CURIAM.

This proceeding to apportion benefits to lands from a drainage project is related to Lost Creek Drainage Dist. v. Elsam, *post* p. 705, 199 N. W. 2d 387.

Landowners Johnson Farms, Ruth Canaday, and Vera Jo Cueva objected at the hearing before the board of supervisors of the district on apportionment. From the determination by the board they appealed to district court. The court decreased the percentage of benefits apportioned to some tracts of Johnson Farms and Canaday. It reversed the decision of the board against Cueva, finding no benefit to her land in accordance with

its judgment of even date in the related proceedings, Lost Creek Drainage Dist. v. Elsam, *supra*.

The district appeals. It contends that (1) issue preclusion applied to the lands of Johnson Farms and Canaday, and (2) on de novo review, we ought to reinstate the decision of the board of supervisors.

Evidence of benefits to the lands of Johnson Farms and Canaday was in conflict. The report and testimony of the engineer for the district was opposed by evidence of no benefit. No one testified to benefits anywhere between nothing, for practical purposes, and the amount stated by the engineer.

The lands of Johnson Farms and Canaday formed part of the original district. The district relies on rules of issue preclusion at common law. A variable in issue preclusion is identity of issues in the two trials. See Vestal, Res Judicata/Preclusion, V-15, V-190-96 (1969). Petersen v. Thurston, 161 Neb. 758, 74 N. W. 2d 528 (1956), decided that an adjudication of organization precluded landowners' contentions that their land was not benefited at all.

The difficulty with the argument of the district is that the issues are not the same, although overlapping exists. The Legislature has prescribed one procedure for determining the existence of any benefit, and another procedure for determining the amount of benefits to a given tract. Evidence of no benefit may possess probative value by implying that benefits are minimal. A court might infer from testimony to no benefits that the benefits would not exceed the minimum amount for inclusion of land within a district. Such an inference would not run afoul of rules of issue preclusion. The decreases adjudged by the court concededly apportioned substantial benefits to the lands of Johnson Farms and Canaday. The benefits were much greater than the minimum required for inclusion of land in the district.

The finding of the district court in an intermediate range between no benefits and the benefits found by

the engineer was permissible. Exactness of apportionment among landowners in a drainage district is impossible. See, Drainage Dist. No. 1 v. Village of Hershey, 145 Neb. 138, 15 N. W. 2d 337 (1944); Nemaha Valley Drainage Dist. v. Stocker, 90 Neb. 507, 134 N. W. 183 (1912). The situation is analogous to an eminent domain proceeding in which the amount of a jury verdict may fall between conflicting opinions of value. See Iske v. Omaha Public Power Dist., 185 Neb. 724, 178 N. W. 2d 633 (1970).

Of the three landowners only Canaday has filed a brief in this court. The district implies a concession of error by Johnson Farms and a discretion in this court to reverse on that ground. See, Berkshire v. Caley, 157 Ind. 1, 60 N. E. 696 (1901); International Security Life Ins. Co. v. Gibson, 448 S. W. 2d 204 (Tex. Civ. App., 1969). Under Rule 16 of this court in such a situation the appellant may proceed ex parte. No other part of our rules is relevant. It follows that failure of an appellee to file a brief in this court is not a concession of error. The record and the brief of appellant must be considered. Cf. Rule 31 (c), United States Courts of Appeals Rules; Teamsters, Chauffeurs, etc., Local 524 v. Billington, 402 F. 2d 510 (9th Cir., 1968).

Upon appeal to district court from a decision of the board of supervisors of a drainage district, all original objections made to the classification and assessment of benefits are heard and determined in a summary manner as in equity, and upon appeal to this court the cause is tried de novo. Petersen v. Thurston, *supra*. See, also, § 31-329, R. R. S. 1943.

When, as required by statute, the district engineer has examined the land and made his report to the board of supervisors of the drainage district which has approved the report, the report furnishes prima facie evidence of the classification and benefits, and in the absence of fraud, such evidence is sufficient to sustain the decision of the board unless the decision is overcome

by competent evidence to the contrary. Petersen v. Thurston, *supra.*

There was no fraud. The evidence raised questions of fact turning largely on the credibility of the witnesses. We affirm the judgment, except a land description, determining the amount of benefits to the tracts of Johnson Farms and Canaday. The north one-half of Section 6 of Johnson Farms lies in Township 7, not Township 8. The judgment respecting the Cueva land is affirmed.

AFFIRMED AS MODIFIED.

IN RE LOST CREEK DRAINAGE DISTRICT OF KEARNEY COUNTY, NEBRASKA.
LOST CREEK DRAINAGE DISTRICT OF KEARNEY COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. HARRY ELSAM ET AL., APPELLEES AND CROSS-APPELLANTS.
199 N. W. 2d 387

Filed July 7, 1972. No. 38084.

1. **Statutes: Res Judicata: Estoppel: Common Law.** Statutory provisions may cut across issue preclusion at common law.
2. **Drains and Drainage Districts.** Land that will not be benefited by an improvement proposed by a drainage district ought not to be annexed to the district.

Appeal from the district court for Kearney County: EDMUND NUSS, Judge. Affirmed as modified.

Meier & Adkins, for appellant.

Person, Dier & Person, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

PER CURIAM.

On petition of Lost Creek Drainage District for an order annexing tracts of land, the district court granted the petition in part. Lost Creek appeals, assigning error

relating to the tracts excluded. Landowners whose tracts were annexed cross-appeal. Lost Creek argues issue preclusion against all landowners except one on the ground of a prior determination that apportioned benefits to the tracts. It and each landowner assert a right to a favorable judgment on evidence pertaining to each tract.

Lost Creek petitioned to increase its size to an area approximately equal to 47 sections of land. The district court granted the petition for 16 tracts and denied the petition for 27 tracts. The latter are equal in area to 6.75 sections of land.

Lost Creek with the boundaries for which it petitioned, would be located in Townships 7 and 8 of Ranges 14, 15, and 16 in Kearney County. The area forms part of the watershed of the Platte River. See Nebraska Soil and Water Conservation Commission, Report on The Framework Study, Appendix C, Land and Water Resources Problems and Needs, Map Section, Key 6 (State Water Plan Publication No. 101C) (1971). The general lay of the land follows the slope of the Platte River from west to east. The improvement project, a ditch, is to run from the western part of the Lost Creek district slightly east of north across two sections within the district to the Platte River.

In 1967 a petition filed for formation of Lost Creek Drainage District included many of the tracts now in controversy. On objection by the owners, petitioners dismissed them without prejudice. The district court in its decree of organization accordingly excluded the tracts.

In May 1969 the board of supervisors of Lost Creek received the report of its engineer on apportionment of benefits. The report apportioned benefits to the 43 tracts outside the district. The board set the matter for hearing in June, and it notified all owners by mail. It also directed the filing of a petition in district court to annex the 43 tracts. On June 23, 1969, the board

confirmed the apportionment in the report of the engineer. Of the tracts in question some owners appeared at the board hearing. Others did not do so. Vera Jo Cueva appealed from the board decision to district court. In the annexation proceeding the decree of the court was rendered in December 1970.

Lost Creek contends that the apportionment decision, except the part against Cueva, precludes the issue whether the tracts will receive benefits for purposes of annexation. The contention necessitates a summary of the statutory provisions for drainage districts organized in district court.

The district engineer is under a duty to report his apportionment of benefits to lands from the proposed improvement. If it appears that lands outside the district will receive benefits, the chairman of the board of supervisors must petition the district court for a decree of annexation. See §§ 31-317 and 31-320, R. R. S. 1943. Provisions for service of summons in civil cases control. See §§ 31-303 and 31-320, R. R. S. 1943. Provisions for tax levies refer to property within the district. See §§ 31-330, 31-332, and 31-364, R. R. S. 1943.

Statutory provisions for hearings on apportionments of benefits are specific. Within 10 days after the filing of the report of the engineer, the chairman of the board of supervisors is to call a meeting of the board to set the matter for hearing. The hearing date must be 40 to 50 days from the date of the meeting. The hearing is to cover all objections by an owner of any land upon which the engineer recommends an assessment of benefits. See § 31-323, R. R. S. 1943. Notification of the hearing is to be given by publication. The notification need not name the interested parties. A sufficient form refers to property "included within (here insert name of drainage district) . . . ," and the hearing in part is "to assess benefits to the property . . . in said drainage district and to classify the same . . . ." § 31-324, R. R. S. 1943. Appeals may be taken to district court which is

to sit in equity and determine all objections in a summary manner. § 31-329, R. R. S. 1943.

Section 31-367, R. R. S. 1943, since enactment in 1905, has provided: "Sections 31-301 to 31-369 shall be liberally construed to promote the drainage and reclamation of wet, overflowed or submerged lands. The establishment of said corporation, and the collection of assessments, shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court, or of the board of supervisors confirming and establishing the assessment of benefits and injuries, but such judgment shall be conclusive and final that all prior proceedings were regular and according to law. No person shall be permitted to take advantage of any error, defect, or informality, unless the person complaining thereof is directly affected thereby, at any stage of the proceedings. If the court or board of supervisors shall deem it just to release any person, or modify his assessment or liability, it shall in no manner affect the right or liability of any other person."

The statutory sections regulating procedures for annexation and apportionment of benefits are ambiguous. We construe them to limit the apportionment hearing to land within the district, our construction being subject to specific statutory exceptions for entities not present here. One reason for our conclusion is the incorporation of general provisions for service of summons in an annexation proceeding and the provisions for publication of notification of the apportionment hearing before the board of supervisors. Another reason is fairness to landowners. It is no answer that in this proceeding the district notified the landowners by mail or that some landowners appeared generally at the apportionment hearing. Statutory provisions may cut across rules of issue preclusion at common law. Cf. Vestal, Res Judicata/Preclusion, V-504 (1969). They have done so in this proceeding. The contention of Lost Creek is not well taken.

Land that will not be benefited by an improvement proposed by a drainage district ought not to be annexed to the district. See Petersen v. Thurston, 157 Neb. 833, 62 N. W. 2d 68 (1954).

It is impossible within the limits that we are justified in devoting to this opinion to set forth the evidence pertaining to drainage of each tract. Cf. Nemaha Valley Drainage Dist. v. Marconnit, 90 Neb. 514, 134 N. W. 177 (1912). Evidence relating to many tracts was in conflict and determinable by the credibility of the witnesses. The court at the trial said, "I have definitely made up my mind that I am going to view the premises . . . ." The journal entry of the judgment states: "All costs taxed to the plaintiff including a charge of Ten Dollars . . . to be paid to John E. Dier, for the use of his car in viewing the premises." We conclude that the district court viewed the tracts.

We determine that the cross-appeal should be sustained and the judgment of the district court modified to exclude the following tracts from the district: Northeast quarter of Section 19, Township 7, Range 16 (Ryan); northwest quarter of Section 18, Township 7, Range 15 (Schneider); north 50 rods of southwest quarter of Section 26, Township 8, Range 15, north one-half of southwest quarter and southwest quarter of southwest quarter of Section 29, Township 8, Range 15 (Lowe); and north one-half of southeast quarter of Section 29, Township 8, Range 15 (Smith); all in Kearney County, Nebraska.

On de novo review we affirm the judgment as modified.

AFFIRMED AS MODIFIED.

JAKE STASCH ET AL., APPELLANTS, V. CLYDE WEBER ET AL., APPELLEES.
199 N. W. 2d 391

Filed July 7, 1972. No. 38354.

1. **Quo Warranto: Evidence: Trial: Officers.** In a quo warranto proceeding, ordinarily the burden of proof in the first instance is on the defendant who claims the right to the office.
2. ———: ———: ———: ———. In a quo warranto proceeding, no legal presumption arises in favor of the defendant merely from his establishment of his possession of the office which he claims.
3. **Quo Warranto: Parties.** Section 25-21,122, R. R. S. 1943, provides any elector of the appropriate county may bring a quo warranto proceeding against any county public office holder when the county attorney of the appropriate county refuses to do so.
4. **Quo Warranto: Evidence: Trial: Officers.** Generally, in a quo warranto proceeding, when a challenged official purports to hold office by virtue of an election, he must show that the election was held and that he was in fact elected.
5. **Quo Warranto: Officers: Time.** Generally, provisions for holding over until a successor is elected and qualified do not prolong the incumbent's term indefinitely, but only for a reasonable time to allow a successor to qualify.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Michael V. Smith, for appellants.

W. Gerald O'Kief, John A. Wagoner, and Thomas A. Wagoner, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a quo warranto action initiated by several residents of Cherry County, Nebraska, seeking to oust the members of the Cherry County Committee for the Reorganization of School Districts, hereinafter referred to as the County Committee. The district court resolved

all of the issues in favor of the defendants. We reverse the judgment of the district court and direct that a judgment of ouster be entered.

The issues presented in this case are whether the defendants, in the first instance, were lawfully elected to office and second, whether they are lawfully holding office at the present time. The statute establishing the procedure for the election to the County Committee is section 79-426.05, R. R. S. 1943, which provides in relevant part: "All of the members of the school boards and boards of education within the county and joint districts under the jurisdiction of that county committee shall, at a meeting called for that purpose by the county superintendent of schools within one hundred twenty days from August 27, 1949, and each four years thereafter, (1) determine by a majority vote of those present the number of members of the county committee within the limits prescribed in this section, and (2) elect for a term of four years all the remaining members of the committee * * *."

Because of the nature and importance of an ouster action, the rules governing the procedure are different than in an ordinary civil action. No presumption arises in a person's favor merely from his physical possession or his attempt to exercise the authority of a public office. In an ouster action, the person claiming the office must make a prima facie showing of his legal right to hold the office. Once that is done, certain presumptions (not applicable herein) arise in his favor which may cause the burden of advancing to shift to the relator, but it is clear that the burden of proof in the first instance is on the defendant whose right to the office is challenged. See, State ex rel. Einstein v. Northup, 79 Neb. 822, 113 N. W. 540; 74 C. J. S., Quo Warranto, § 43, p. 260; 44 Am. Jur., Quo Warranto, § 106, p. 167; Ferris, Extraordinary Legal Remedies, § 136, p. 156.

The relators have standing to bring this action. This is true even though they claim no right to the office

themselves. This result follows from a proper construction of section 25-21,122, R. R. S. 1943. The action, under the statute, must in the first instance be brought by the county attorney of the appropriate county. The statute provides that in the event he refuses to bring such action, a private person acting in the public interest may bring such action to oust an officeholder who is not legally entitled to his office. The relators, having complied with the provisions of the statute, become substituted in interest with the county attorney and it follows that the same rules as to burden of proof and procedure apply as if the action were brought by the Attorney General or the county attorney in the first instance.

We turn to the evidence. Despite the fact that the statute requires an election every 4 years, the only official record in the evidence in this case of an election of or to the County Committee are the minutes of a meeting held for that purpose on *October 15, 1957*. The minutes show that one "Cleo Bloom" was elected in 1957, and that "Cleo Bloom, Jr." is a defendant in this action brought over 10 years later. There is nothing in the record to explain or to show that these names refer to the same person. More important, "Bob Hanna" was elected, according to the minutes, in 1957, and "Samuel K. Hanna" is a defendant herein. There is an oblique reference in the record which indirectly suggests that these may be the same persons, but there is no proof that they are. Surely the identity of an elected public official must be established with certainty and cannot rest upon speculation as to phonic similarity.

The record does show that in January 1963, an information letter was sent to the State Committee for Reorganization of School Districts which shows the names of the members of the County Committee and indicates that they were elected April 5, 1962. But nowhere in the record does there appear the official minutes of the County Committee, the results of the

voting, or a canvass of the votes to establish officially the record of the defendants' election. No explanation of this failure appears in the record. It is not suggested that they were lost, destroyed, or for some other reason secondary evidence could not be introduced to establish the minutes showing that the statutory procedure had been followed and the election held. It becomes apparent there is a total lack of competent proof in this record to establish that a proper election was held under the statute and that the defendants were legally elected by a majority vote of those present to the office they now purport to hold.

Turning now to the situation 4 years later in 1966 we find there is evidence in the record showing the publication of an official notice of an election to be held to select members of the County Committee. This election was to be held, pursuant to the terms of the notice, on April 1, 1966. Assuming that this election was held, pursuant to the notice, there is no record of the results. The lack of all official action and all official record is confirmed by the fact that the only evidence introduced in this respect is that the then county superintendent of schools testified this election was in fact held but *could not remember who had been elected.* Again, there are no official minutes, no showing that the election was held by the proper officers, no showing that the votes were canvassed, or the number of votes cast or that they were cast by the authorized persons. Again, the only evidence in the record in this respect is that almost one and one-half years later, in August 1967, and again in August 1968, an information letter was sent to the State Department of Education which purports to show that the members of the County Committee included most, but not all, of the defendants. Again, the court is left in doubt with reference as to whether any legal election was held, because there is no statement or report of the election and its results in this information letter.

We can come to no other conclusion but that the defendants have failed to meet their burden of proof. Without explanation, there are no official minutes or record of official board action, no official document in the record which entitles the defendants to hold the office that they purport to occupy. When a challenged official purports to hold office by virtue of an election, he must show that the election was held and that he was in fact elected. Holding a public office can rest on nothing less than such evidence, unless a satisfactory and convincing explanation is made as to the lack of an official record. The right to hold a public office is ordinarily shown by producing a certificate of election by the proper officer, or by showing that by the canvass of votes at the election by the authorized persons, the officer has received a plurality or the necessary number of votes to have been elected. 2 Bailey on Habeas Corpus, § 329, p. 1278. There is no showing in this record explaining the failure of proof of the official action in the official minutes of the County Committee. The integrity of the elective process cannot be established by extra-statutory informational letters signed by one person as a substitute for the unexplained absence of any official record of the election and the legal results thereof. There has been an entire failure of the burden of proof on the part of the defendants to establish their right to hold the purported office that they claim.

Also the defendants contend that they are holding over in office by virtue of section 32-1045, R. R. S. 1943, which provides for an incumbent to remain in office after the expiration of his term until his successor is duly qualified. There are two answers to this contention. First, this section obviously has no application in a quo warranto proceeding where the officer cannot show that he was an incumbent who was rightfully in office in the first place. Second, even if the defendants are the same persons who were elected in 1957, they

cannot claim the protection of the statute. The proper rule is stated in 67 C. J. S., Officers, § 48, p. 204, where it is stated: "Provisions for holding over until a successor is elected and qualified do not prolong the incumbent's *term* indefinitely, but only for a reasonable time to *allow a successor to qualify.*" (Emphasis supplied.) The only purpose of the holding over statute is to prevent a temporary vacancy in a public office, and to permit a reasonable time to allow for the exigencies many times present in the transfer of public office from one person to his successor. It was not intended to eliminate the necessity for having a proper and required statutory election, and keeping a proper official record of such election and the results thereof. Otherwise the integrity of the elective process would be emasculated by the indifference or the negligence of the parties responsible under the statute for complying with the mandatory requirements of holding the election and officially reporting the results thereof. All of these principles are particularly applicable where you have the same entity charged with the responsibility of the election of their own successors in office.

In the context presented here the defendants' contention that they are legally holding over in office as incumbents is without merit.

Other issues are presented in the briefs of the parties. The main contention is the unconstitutionality of the enabling statutes for the creation of the County Committee and the exercise of its powers thereunder. It is not necessary to discuss this issue because, from what we have said herein, the defendants are not legally holding office and are subject to ouster. We point out, however, that the only issue in a quo warranto action which may be litigated is the right of the defendant to hold public office, and the action must be strictly confined to that issue. The legality of the official action or the constitutionality of the statutes under which the officer purports to act may not be litigated in a quo warranto

action. State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784; State ex rel. Good v. Conklin, 127 Neb. 417, 255 N. W. 925; 74 C. J. S., Quo Warranto, § 11, p. 193.

The judgment of the district court is reversed and the cause remanded with directions to enter the proper judgment of ouster against the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD JOHNSON ET AL., APPELLEES, V. FLOYD E. ROUECHE, APELLANT.
199 N. W. 2d 1

Filed July 7, 1972. No. 38364.

1. **Judgments: Trial: Appeal and Error.** The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong.
2. **Negligence: Words and Phrases.** The words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The test the statute provides is not based upon absolute degree of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant.
3. ———: ———. The meaning of gross negligence under the comparative negligence rule is not the same as the meaning of gross negligence under the guest passenger statute.
4. **Negligence: Trial.** Under the comparative negligence statute, if the fact finder determines the respective parties to be guilty of actionable negligence and contributory negligence, the responsibility is then on it to make the comparison contemplated by the statute.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Baskins, Baskins & Schneider, for appellant.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is an action for property damage resulting from an automobile accident at a street intersection in North Platte, Nebraska. Jury trial was waived. The trial court determined that the comparative negligence rule applied and entered judgment for the plaintiff in an amount less than the stipulated amount of damages. The defendant has appealed. The issues on appeal involve the contributory negligence of the plaintiff and the application of the comparative negligence rule.

The accident happened at approximately 8:30 a.m., on a clear, dry day at the intersection of Second and Sherman Streets in the City of North Platte, Nebraska. The plaintiff, Maxine Johnson, was driving her car north on Sherman Street. The defendant, Floyd E. Roueche, was driving his pickup truck east on Second Street. There were no obstructions to vision although there were some cars parked on the south side of Second Street some 150 feet west of the intersection. There were no stop signs or traffic signals at the intersection. Mrs. Johnson was going approximately 15 miles per hour as she approached the intersection. As she approached the crosswalk south of the intersection, she slowed to approximately 5 miles per hour. She looked to the left; to the right; and to the left again but saw no approaching traffic. When her car was a little more than half a car length into the intersection, she saw the defendant's truck approaching from the left. The front of the truck was at the crosswalk just west of the intersection. Mrs. Johnson applied the brakes and her car, if not stopped, was barely moving at the moment of impact.

The defendant was driving his pickup truck at a

speed of approximately 25 miles per hour as he approached the intersection. He did not see Mrs. Johnson's car. He was first made aware of its presence when his daughter screamed immediately before the impact. The defendant did not recall applying the brakes before impact and did not swerve his truck to avoid the impact. The right front of the truck struck the left front of the Johnson car. The impact occurred in the southeast quadrant of the intersection. The Johnson car was spun around and came to rest in the intersection headed southeast. The defendant's truck stopped 75 to 100 feet east of the intersection.

The trial court found that the proximate cause of the collision was the defendant's negligence; and that the plaintiff was negligent, but her negligence, under the comparative negligence rule, was slight when compared to the negligence of the defendant. The damage to plaintiff's car was stipulated in the amount of $1,320.74. The court dismissed defendant's counter-claim and entered judgment for the plaintiff and against the defendant in the sum of $1,000.

Section 25-1151, R. R. S. 1943, provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." Here a jury was waived and the case was tried to the court. In the posture of this case, unless the defendant was entitled to a directed verdict as a matter of law, the judgment must be affirmed. The judgment of the trial court in an action where a

jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Belek v. Travelers Indemnity Co., 187 Neb. 470, 191 N. W. 2d 819.

The defendant's contentions here boil down to the assertion that the comparative negligence rule does not apply. It is argued that where a defendant's negligence is less than gross in degree and the plaintiff has been guilty of any negligence, the plaintiff may not recover. It is also argued that wherever the plaintiff's negligence is more than slight in degree, or when the negligence of both defendant and plaintiff stem from an identical failure of duty, there can be no recovery under the comparative negligence rule. In essence, the defendant contends that the statutory comparative negligence terms of "gross" and "slight" are based upon absolute degrees of negligence circumscribed by definitions of the term "gross" applied under other statutes or in abstract terms. We cannot agree.

The defendant's contention that "gross" or "slight" negligence under the comparative negligence statute may be defined or measured by some independent absolute standard was effectively answered in Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246. That case noted that the statutory comparative negligence rule is predicated on a comparison and the terms of "slight" or "gross" negligence as used in the statute are both dependent upon a comparison of the negligence of the parties. The court stated that "all questions of slight or gross negligence in cases in which the comparative negligence act is applicable are to be determined not by satisfying a rule of burden of proof but by comparison made by the jury, or in its absence by the court, of the negligence of the parties, one with the other."

The court also reiterated a former statement: "The words 'slight' and 'gross' as employed in the comparative negligence act of this state are comparative terms. The test the statute provides is not based upon absloute

degree of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant." See, also, Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482.

Defendant's contention that gross negligence ought to be defined as a matter of degree in terms similar to the meaning of gross negligence under the guest statute was answered in Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774. In that case, the jury had been instructed that slight negligence meant small or little negligence and that gross negligence meant great or excessive negligence. In holding such instructions erroneous, this court stated that under section 25-1151, R. R. S. 1943, it was necessary to determine whether the negligence of plaintiff or defendant was slight or gross in comparison with the other, "while under the automobile guest passenger statute, section 39-740, R. R. S. 1943, a standard of gross negligence is set up that is not based on the comparison of negligence. Before a guest may recover from the driver of an automobile under the guest passenger statute, the driver must be found guilty of gross negligence, that is, great or excessive negligence. Such is not true under the comparative negligence rule." The meaning of gross negligence under the comparative negligence rule is clearly not the same as the meaning of gross negligence under the guest passenger statute.

The question of the existence of negligence or contributory negligence is for the trier of the facts where different minds may reasonably draw different conclusions from the evidence. Under the comparative negligence statute, if the fact finder determines the respective parties to be guilty of actionable negligence and contributory negligence, the responsibility is then

on it to make the comparison contemplated by the statute. See, Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

The determinations made by the trial court were correct in all respects and the judgment is affirmed.

AFFIRMED.

JOHN WISNIESKI, APPELLANT, V. ERNEST HARMS AND LAMBERT JONAS, ADMINISTRATOR OF THE ESTATE OF ROSIE (ROSE) HARMS, DECEASED, APPELLEES.

199 N. W. 2d 405

Filed July 7, 1972. No. 38395.

1. **Trial: Witnesses.** The credibility of the witnesses and the weight to be given to their testimony are for the jury's consideration, and not for the court.
2. **Brokers: Principal and Agent: Negligence.** A broker is precluded from recovering compensation for his services when selling the land of his principal, if he is guilty of misconduct in negotiating a contract at variance with the one which he is authorized to make, or disobeys his principal's orders or instructions, or he causes loss to his principal by reason of his negligence in drawing or negotiating a contract of sale for his principal.
3. **Instructions: Appeal and Error.** Instructions must be construed together and isolated language, taken out of context, is not sufficient to support a challenge of error if the whole instruction or all of the instructions are not misleading or erroneous.

Appeal from the district court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

Homer E. Hurt, Jr., for appellant.

Edward Asche, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an action by a real estate broker to recover

a commission for handling the sale of the vendors' land. The jury denied recovery and John Wisnieski, the broker, has appealed. We affirm the judgment of the district court.

The basic question in this case is whether there was sufficient evidence to support the court's submission to the jury of the issues raised in the affirmative defense set up by the vendors. The vendors allege that the broker had been negligent in drafting the sales contract, had been guilty of misrepresentation, and had been negligent in failing to follow the vendors' instructions.

In reviewing the evidence the defendant is entitled to a resolution in his favor of all conflicts in the evidence and controverted questions of facts, and is entitled to the benefit of all of the reasonable inferences that may be drawn from the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the jury's determination, and not for the court. Sall v. Schnackenberg, 178 Neb. 699, 134 N. W. 2d 808. The evidence must be measured against the yardstick of a broker's obligations under the law to his principal. A broker is precluded from recovering compensation for his services when selling the land of his principal, if he is guilty of misconduct in negotiating a contract at variance with the one which he is authorized to make, or disobeys his principal's orders or instructions, or he causes loss to his principal by reason of his negligence in drawing or negotiating a contract of sale for his principal. 12 Am. Jur. 2d, Brokers, § 168, p. 910; Schepers v. Lautenschlager, 173 Neb. 107, 112 N. W. 2d 767; Mattieligh v. Poe, 57 Wash. 2d 203, 356 P. 2d 328, 94 A. L. R. 2d 464.

Prior to January 1963, the vendors, Mr. and Mrs. Ernest Harms, hereinafter referred to as the Harmses, owned the southeast quarter of the southeast quarter and the east half of the southwest quarter of the southeast quarter, Section 8, Township 20 North, Range 5

East of the 6th P. M., Dodge County, Nebraska. In January 1963, the Harmses sold to Mr. and Mrs. Leonard Wiese a small acreage or tract of land for residence purposes in the southeast corner of the southeast quarter of Section 8. The Wieses also maintained a small machine or workshop on the premises. Along and near the border on the west of this tract was a grove of trees. Also, toward the northeast corner of this small residence tract was a driveway leading from the road which bounded the tract on the east. A survey later showed that the driveway was in the area conveyed by the Harmses but that the border grove of trees still belonged to them. In any event, it was thought by the Harmses, and apparently by all parties concerned, that neither the driveway nor the trees were within the Wieses' tract at the time of the negotiation of the sale contract involved herein. The evidence is that the Wieses expressed the desire to purchase the land where the driveway and the bordering trees were if the Harmses ever decided to sell it, and it was agreed that the Wieses would be given this opportunity.

On August 18, 1965, the Harmses signed a listing contract giving the plaintiff Wisnieski, a licensed real estate broker, the exclusive right to sell their remaining land in the section. Because of the relatively uncertain situation as to the driveway and the grove of trees, it was necessary for the Harmses to give Wisnieski specific instructions as to its disposition. Mr. Harms testified at the trial, in substance, that he had given Wisnieski instructions to offer the Wieses the land which included the trees and the driveway before Wisnieski was to sell to anyone else. To the contrary, Wisnieski testified that no instruction was ever given him as to the trees but only that he was instructed to and did, in fact, inform the Wieses about the driveway.

In any event, subsequent to the listing contract, on September 1, 1965, an agreement to sell "40 acres more or less" was signed by the Harmses as vendors and

by one Joseph Sechovec as purchaser. Again, Mr. Harms testified that prior to the signing of the contract with Sechovec, Wisnieski had told him that the Wieses would be getting the trees and the driveway but later Wisnieski told him that Sechovec was to have the trees and the driveway. Wisnieski, of course, was anxious to sign the agreement with Sechovec and to complete the sale. In direct conflict with Harms' testimony, he testified that he had never mentioned to the Harmses that the tree area would go to the Wieses. It is apparent at this point that there is a direct conflict in the testimony as to what the instructions were to Wisnieski and whether he failed to perform them in negotiating the sale with Sechovec. Supporting the Harms' version of the testimony and the jury's finding in this case is the reasonable inference that the bordering grove of trees, immediately adjacent and coextensive with the west boundary of the Wieses' property, was a natural and integral part of the residence acreage. It therefore follows that the evidence is sufficient to sustain the finding that the Harmses gave specific instructions which were either intentionally or negligently violated by Wisnieski in the execution and negotiation of the contract with Sechovec.

This misunderstanding or dispute led to serious difficulties and litigation concerning the performance of the Sechovec contract. Despite the contractual agreement, containing an agreement to sell "40 acres more or less," a reasonable inference is that the Harmses' refusal to convey title to Sechovec as to the balance of their property, as promised, was because Wisnieski had either negligently or intentionally violated the instructions that the Harmses had given him. Sechovec brought suit for specific performance and the Harmses were ordered to convey approximately 41 acres to Sechovec. In connection with this dispute a survey was conducted in relation to the 1963 conveyance to the Wieses. This survey showed that the 1963 conveyance to the Wieses

had included the driveway, but not the tree area. The court-ordered conveyance to Sechovec *did not include the tree area either.* This finding in the specific performance case is consistent with and is confirmatory of the jury finding in this case that the instructions to Wisnieski had not been followed as directed. Subsequently, the tree area was conveyed by the Harmses to the Wieses. Compounding the difficulty, after the suit for specific performance, Sechovec sought to recover rent for the period that he was wrongfully held out of possession of the land, which failure to render possession arose out of the situation surrounding the conveyance of the trees and the driveway. In this case the trial court found in favor of the Harmses, and we affirmed. Sechovec v. Harms, 187 Neb. 70, 187 N. W. 2d 296. We come to the conclusion that there is sufficient evidence to support the finding of the jury in favor of the Harmses on the affirmative defenses set up by them to this action for the recovery of the commission.

The plaintiff in this case has assigned numerous errors. Many of them are not specifically argued and are therefore not before us. We briefly note those that are worthy of consideration. The Harmses filed a cross-petition in this case for the recovery of their expenses in the specific performance action brought against them. The jury found against them. Neither the plaintiff Wisnieski nor the Harmses, by way of cross-appeal, have appealed from the judgment on the cross-petition. The plaintiff argues that the finding for the plaintiff on the defendants' cross-petition is inconsistent with the finding against Wisnieski on the action for the commission. This contention fails, first, because the judgment on the cross-petition is final and unappealed from and is conclusive on the parties. The only issues properly before us are the issues raised in the plaintiff's petition and the defendants' answer in the action for the recovery of the commission. Second, the issues on the cross-petition were different and the jury may have

well found that the Harmses could not recover on the cross-petition because of the failure to prove that Wisnieski's breach of duty was the proximate cause of the loss suffered by the Harmses or the amount of the damage properly attributable to such breach of duty.

Wisnieski further contends that the successful suit by Sechovec for specific performance against the Harmses is res judicata of the issue of his alleged negligence in drafting the offer to purchase. However, Wisnieski was not a party to the Sechovec suit, and the issues were entirely different. Whether the Harmses were bound by the representations and the contract drawn by Wisnieski, is an entirely different issue than whether Wisnieski breached his duty as an agent of the Harmses in the drafting and in the performance of the sale contract. Res judicata is not applicable. American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466.

The plaintiff makes an extensive argument as to error in instructions. As we understand it, this contention, boiled down, is that the court in the sixth instruction provided that: "If the defendant has failed to establish *any* of the propositions * * *, you are instructed to find for the plaintiff * * *." And later on the instruction said: "* * * if the defendants have established * * * *any* one of their affirmative allegations * * *, you shall find for the defendants and against the plaintiff on his petition." (Emphasis supplied.) The plaintiff contends that this instruction is ambiguous and self-contradictory. We disagree. Instructions must be construed together and isolated language, taken out of context, is not sufficient to support a challenge of error if the whole instruction or all of the instructions are not misleading or erroneous. We will not burden this opinion with a recital of the rather lengthy instructions covering these issues. Suffice it to say, the instructions as a whole are consistent and clear and fairly presented the issues to the jury. This contention is without merit.

The evidence is sufficient to support the verdict, there is no error in the instructions, and the other assignments of error are without merit. The judgment of the district court is correct and is affirmed.

AFFIRMED.

HYDROTEX, A CORPORATION, APPELLEE, V. L. D. PUTNAM, APPELLANT.
199 N. W. 2d 395

Filed July 7, 1972. No. 38428.

Judgments: Appeal and Error. No judgment shall be reversed for an error that does not affect the substantial rights of the adverse party.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

William W. Griffin, for appellant.

Cronin & Hannon and Van Steenberg, Winner & Brower, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury returned a general verdict for plaintiff in the sum of $1,921.82, which represented the price of goods plaintiff allegedly sold defendant. On appeal defendant only contends the court erred in giving the jury a single verdict form that required a finding for plaintiff.

The bill of exceptions is a case stated. Defendant admitted receipt of some of the goods and use of a small part. He offered evidence to establish a sale on approval or on return. See §§ 2-326 and 2-327, U. C. C. The district court instructed the jury in substance that defendant was liable for the part used. Defendant does not complain of the instructions except the one that submitted the single form of verdict.

The record omits a description of the items defendant used. Some, such as tar and lube, were consumable goods. The jury necessarily disbelieved defendant's evidence. Otherwise under the instructions it would have found an amount less than the total of plaintiff's claim.

No judgment shall be reversed for an error that does not affect the substantial rights of the adverse party. § 25-853, R. R. S. 1943. The contention of defendant is not well taken.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. RICE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. EDWARD POINDEXTER, APPELLANT.

199 N. W. 2d 480

Filed July 14, 1972. Nos. 38157, 38188.

1. **Criminal Law: Searches and Seizures: Constitutional Law: Affidavits.** An affidavit for search warrant is sufficient to meet the standards of the Fourth Amendment to the Constitution of the United States if it complies with the ruling in United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723.
2. **Criminal Law: Searches and Seizures: Constitutional Law: Evidence: Parties.** The suppression of the product of a Fourth Amendment violation can be successfully urged only by the one whose rights were violated by the search itself, not by one who is aggrieved solely by the introduction of damaging evidence.
3. **Criminal Law: Searches and Seizures: Constitutional Law.** The Fourth Amendment does not clearly delineate between searches which are legal and those which are illegal; it only prohibits the unreasonable, with each particular case being decided on its own circumstances.
4. **Criminal Law: Searches and Seizures: Constitutional Law: Evidence: Arrest.** Seizing from the clothing of a lawfully arrested person evidence that is intimately connected with the crime for which he is arrested is not unreasonable under the Fourth Amendment.
5. **Criminal Law: Evidence: Arrest.** The information supplied to

a judicial officer issuing an arrest warrant on a sworn complaint may be supplemented by additional information which the arresting officers themselves have or have acquired before the arrest and which is corroborative of the complicity of the arrestee in the crime.

6. **Criminal Law: Parties: Intent: Aiders and Abettors.** If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him.
7. **Criminal Law: Parties: Intent: Homicide: Evidence: Trial.** Threats and expressions of ill will are in intentional homicide admissible to show intent, malice, or motive. Malice and motive are relevant and material not merely as evidence of intent, but also on the issue of guilt or innocence as tending to point to the identity of the perpetrator or perpetrators.
8. ———: ———: ———: ———: ———: ———. In a prosecution for intentional homicide committed against one of a class, threats by the defendant against the class are admissible.
9. **Criminal Law: Parties: Trial: Conspiracy.** Two or more defendants may be tried together where each of the defendants is charged with accountability for the offense or offenses or where the offense is part of a common scheme or plan or conspiracy.
10. **Criminal Law: Parties: Trial: Evidence.** Defendants challenging a joint trial must affirmatively demonstrate that the joint trial has prejudiced their individual rights.
11. **Criminal Law: Trial: Evidence.** Irrelevant and immaterial evidence erroneously admitted is not necessarily prejudicial.
12. **Criminal Law: Instructions: Trial: Appeal and Error.** Related instructions must be read and construed as a whole and if when so read and construed they correctly state the law there is no error.
13. **Criminal Law: Witnesses: Trial: Jury.** Questions of credibility are ordinarily for the jury to determine and not the court.

Appeals from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Frank B. Morrison, Sr., Thomas M. Kenny, Bennett G. Hornstein, J. Patrick Green, and David L. Herzog, for appellants.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendants, David L. Rice and Edward Poindexter, in a joint trial, were convicted by a jury of murder in the first degree in the bombing death on August 17, 1970, of an Omaha police officer, Larry D. Minard, Sr., and the jury fixed the penalty at life imprisonment.

On this appeal assignments of error relate to the following: (1) Denial by the trial court of motions of both defendants to suppress evidence seized in a search at 2816 Parker Street in Omaha on August 22, 1970; (2) denial by the trial court of motions by both defendants to suppress the results of scientific analysis of clothing taken from each of them following their arrests; (3) instructions to the jury; and (4) overruling by the trial court of objections to admission in evidence of seven certain purported newsletters of the United Front Against Fascism and National Committee to Combat Fascism, local militant black organizations, and denial of related motions to strike and for mistrial. Errors also were alleged in connection with instructions related to said exhibits. In a separate pro se brief Poindexter makes an assignment of error that the evidence is insufficient to sustain the verdict.

We will note each of the assignments of error in order in separate parts of this opinion and make such reference to the evidence and other matters as may from time to time be required in consideration of the assignments. We first, however, briefly set forth some of the necessary factual information concerning the death of Officer Minard.

In the early morning hours of August 17, 1970, the police department of the city of Omaha received a telephone call purportedly originating from 2865 Ohio Street, which call represented that cries of a girl or woman screaming for help were coming from a vacant house next door at 2867 Ohio Street. The police dispatcher relayed the information by radio and several patrol cars responded to the call, including that of

Officer Minard. Certain officers, including Minard, entered the house at 2867 Ohio Street and in so doing noticed and stepped over a suitcase lying on its side near the doorway. While a search was being conducted an explosion occurred, killing Minard who was standing near the suitcase and apparently inspecting it visually or otherwise. Other officers were injured by the explosion. Scientific analysis of the debris of the explosion established that the source was dynamite contained within the suitcase. Other evidence supported the conclusion that the suitcase contained a dynamite bomb which had been booby trapped and set to explode when moved. Subsequent intensive investigation by the police department led to the apprehension of Duane Peak, age 15, the acknowledged deliverer and planter of the booby trapped suitcase and maker of the false telephone report of the cries for help at 2867 Ohio Street. Peak testified for the State and the defendants were convicted as the instigators of the crime.

I.

On August 22, 1970, police officers procured a search warrant authorizing the search of 2816 Parker Street, the residence of David L. Rice, and the seizure of: "Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property." The search was conducted and as a result the following items of property, some of which were introduced into evidence at the trial, were seized: "14 Sticks Dupont Red Cross Extra Strength Dynamite, 40 and 50%. 3 DuPont Elect. Blasting Caps., MS 25, 1 DuPont Elect. Blasting Cap. 3 pcs assorted wire. 1 Marathon #499 RR #6 Volt Battery. 1 pr Homecraft wire dykes. 1 CeeTee Co. Pliers. 1 long nose dyke, made in Japan, orange grips. 2 ⅜ X1X¾ inch permanat magnets." It was the foregoing evidence at which the motions to suppress were directed. Prior to trial a hearing was held on the motions to

suppress, evidence was adduced by all parties, and the trial court denied the motions.

The defendants assert that the search and seizure was in violation of the provisions of the Fourth Amendment to the Constitution of the United States which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The defendants assert that the affidavit upon which the search warrant was issued was invalid in that it does not meet the standards laid down by the Supreme Court of the United States in Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; and Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637. They further contend that evidence seized in the search should have been excluded under the doctrines of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933; and Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726.

The affidavit was prepared by one of the officers in charge of the search while 2816 Parker Street was under surveillance by other officers. It was done under the intensive pressure of the extensive investigation following the bombing and during a time when the officers were working 18 hours day after day.

The affidavit is as follows: "The complaint and affidavit of *Sgt. R. Pfeffer and Sgt. Jack Swanson,* on this *22* day of *August 1970,* who being first duly sworn, upon oath says:

"That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: *Dynamite and devices which could be used to construct devices which could cause injury to persons and dam-*

age to property. Also illegal weapons which he stated should be used against Police Officers. . . .

"That said property is concealed or kept in, on, or about the following described place or person, to-wit: *A one story white frame house on Parker Street at 2816, In Omaha Douglas County, Nebraska.*

"That said property is under the control or custody of *David Lewis RICE, Minister of Information, National Committee to Combat Fascism.*

"That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: *David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occurred, in Omaha and arrests were made from the membership of the NCCF. We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.*

"A warrant authorizing a night-time search is requested because *Nighttime when information was secured, and the property may be removed.*

"WHEREFORE, he prays that a search warrant may issue according to law."

The confused and confusing state of the law of search and seizure is widely recognized. See concurring opinion of Justice Harlan and dissenting opinion of Justice White in Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564; and Landynski, Fourth Amendment Standards, 45 Conn. B. J. 330. We cite and refer to, on the matter covered in this section of the opinion, only those cases which seem most pertinent.

In Aguilar v. Texas, *supra,* the court held that a search warrant was invalid because of a deficient affidavit where the substance of the affidavit was as follows: " 'Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics . . . are being kept at the above

described premises for the purpose of sale and use contrary to the provisions of the law.' " The court held that an affidavit may be based on hearsay, but that the magistrate who was asked to issue the warrant must by the affidavit be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where they were claimed to be and some of the underlying circumstances from which the affiant concluded that the informant was reliable. The affidavit was lacking in these requirements and since it was based solely upon the hearsay testimony of the informant it was invalid. Justice Goldberg, writing for the majority, stated: ". . . when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, (citing Jones v. United States, 362 U. S. 257, 270, 80 S. Ct. 725, 4 L. Ed. 2d 697, 78 A. L. R. 2d 233), and will sustain the judicial determination so long as 'there was substantial basis for (the magistrate) to conclude that narcotics were probably present . . . .' " Justice Goldberg also quoted from Johnson v. United States, 333 U. S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436, as follows: " 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' "

In Spinelli the defendant was convicted on an interstate gambling charge with the use of evidence seized by virtue of a warrant. The affidavit stated the FBI had " 'been informed by a confidential reliable informant' " that the accused was " 'operating a handbook and

accepting wagers . . . by means of the telephones.' " The affidavit also set forth that the defendant had been under surveillance by the FBI for 5 days, had traveled interstate, and had entered an apartment which had two telephones. It further stated he was a gambler and an associate of gamblers. The affidavit was held defective because it did not include information on reliability as required by Aguilar, and because the information relative to the surveillance was not corroborative but only indicative of acts which might be perfectly innocent. The court said: "The affidavit, then, falls short of the standards set forth in Aguilar, Draper, and our other decisions that give content to the notion of probable cause. In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U. S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U. S. 257, 270-271 (1960)."

The latest case we have found touching the sufficiency of the affidavit is United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. That case involved a charge of possessing nontaxpaid liquor. The affidavit, as summarized in the headnotes of the report, stated: ". . . respondent had a reputation with the investigator for over four years as being a trafficker in nontaxpaid distilled spirits; during that time the local constable had located illicit whiskey in an abandoned house under respondent's control; on the date of the affidavit

the affiant had received sworn oral information from a person whom the affiant found to be a prudent person, and who feared for his life should his name be revealed, that the informant had purchased illicit whiskey from the residence described, for a period exceeding two years, most recently within two weeks; that the informant asserted he knew of another person who bought such whiskey from the house within two days; that he had personal knowledge that such whiskey was consumed in a certain outbuilding; and that he had seen respondent go to another nearby outbuilding to obtain whiskey for other persons." Analysis shows the above affidavit contained two things: (1) Alleged factual information from an informer alleged to be "prudent," and (2) the accused had a reputation with the affiant investigator as a "trafficker in nontaxpaid distilled spirits." The affidavit was held sufficient. The court in that case distinguished Aguilar, pointing out that there: ". . . we held that an affidavit based solely on the hearsay report of an unidentified informant must set forth 'some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable."'" The court also said: "We cannot conclude that a policeman's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a 'legal technician' as Mr. Justice Frankfurter—is not a 'practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that Spinelli prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

A reputable legal scholar has stated that Harris "appears to go far in the direction of eroding the force of Aguilar and Spinelli." 45 Conn. B. J., note 51, p. 345.

We now analyze the affidavit here considered in order to determine in the light of the foregoing whether it contains a "sufficient basis for a finding of probable cause" by the magistrate. We conclude it does.

It recites, as we have already noted, that the police department had in the past been informed that Rice kept explosives at his residence and that he had said they should be used against police officers. These allegations standing alone would be insufficient, but they gain force and credibility from the following additional allegations based upon the personal knowledge of the Omaha police department and the affiants: (1) David L. Rice is the Minister of Information, National Committee to Combat Fascism; (2) he is a known member of that organization "which advocates the violent killing of Police Officers"; and (3) the death of a police officer by violence (by means of an explosive booby trap—a fact so notorious at the time in Omaha that even the public had knowledge of it as a fact). That explosives were in fact in the neighborhood was evidenced by their use in the bomb. The facts alleged here over and above the informer's information are much stronger than just the reputation of the suspect which the court found sufficient in Harris.

We call attention to the United States Supreme Court's reference in Spinelli to Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327, and its approval of that case as viable on "the notion of probable cause." That was a case of arrest upon probable cause without warrant, based upon information from an unidentified informant *whose information was given force by occurrences subsequent to the giving of the information but prior to the arrest.* It is important because the Fourth Amendment by its terms makes no distinction between probable cause for arrest and probable cause for search and seizure. More important, that case permitted proof of probable cause for arrest in search in connection therewith by parole testimony, thus in ef-

fect replacing the necessity for an affidavit. This in accordance with long-established common law practice. In that case the informer had given a description of the suspect, including the clothing which he was expected to wear, and his luggage, and also information as to the train on which he would probably arrive at the Denver railroad station and that he would have drugs in his possession. The court held that the fact that when the police officer arrived at the Denver railroad station he there saw alighting from the train as predicted by the informant a person who met the description as to physical appearance, attire, and luggage given by the informant, verified and gave credibility to the tip and made the arrest valid. We do not see how, as that case relates to "probable cause," it can be distinguished from the one at hand. Rice' position as an officer and key member of an organization openly advocating the violent killing of police officers and his own known advocacy of this end accompanied by the bombing itself is, in our judgment, far more indicative of probable cause for search than were the circumstances in Draper for arrest, which circumstances, apart from the informant's information in the case, were simply neutral as far as the indication of crime is concerned.

It is worthy of mention that in connection with the search for explosives and devices at 2816 Parker Street under the warrant, there was conducted simultaneously therewith a search for Duane Peak for whom the police department of Omaha had at that time a warrant for arrest on a charge of first degree murder in connection with the death of Officer Minard. At that time the police department had the following additional information as shown by the police reports introduced into evidence at the hearing on the motion to suppress: (1) On the morning of August 22, 1970, Donald W. Peak, brother of Duane Peak, was arrested and after having been given the Miranda warnings, voluntarily made a

statement to the police. This statement (a) directly, clearly, and almost conclusively identified Duane Peak as the person who physically delivered the bomb and placed the entrapping phone call; (b) Donald attributed Duane's acts to his membership in the NCCF (sometimes referred to in the record as Panthers); (c) indicated that the bomb had probably been made by Poindexter as head of the organization; and (d) that Duane had been told by headquarters "to lay low." (2) Item (1) (a) above was corroborated by five other identified persons from whom statements had been taken by the police department. (3) An identified informant, based on his own knowledge, stated that on the day following the bombing, David L. Rice had said, ". . . the action was a week late." The informant interpreted the comment as referring to the bombing. (4) Rice and Poindexter were leaders and organizers of the NCCF. (5) A tape recording of the voice which had made the entrapping phone call was identified as that of Duane Peak. (6) Poindexter had been arrested about 6 p.m., on August 22, 1970, and declined to talk. (7) Personal knowledge of the police department that Rice had made statements in party newsletters led to the conclusion that he was an outspoken advocate of violence against police officers. (8) There were reports (plural) from individuals (plural) that Rice stored explosives at his home at 2816 Parker Street. (9) Literature had been found at the headquarters of the NCCF containing "directions on how to make bombs."

All of this information was introduced at the hearing on the motion to suppress. Draper v. United States, *supra*, Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306, and other cases appear to us to support the proposition that the affidavit may be supplemented by testimony of additional evidence known to the police.

While up to this point we have treated the search of 2816 Parker Street as though both defendants had

standing to raise the Fourth Amendment question, it is our specific holding that Poindexter has under the evidence shown no standing to raise the question. He claimed at hearing and trial no interest in either the premises or the property seized such as would give him standing. "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing." Alderman v. United States, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176. We point out that had Poindexter so chosen he could at the hearing on the order to suppress have testified to such an interest as would have given him standing, and his testimony could not have been used against him at trial. Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247.

It is quite clear in this case the officers were doing their very best in good faith to follow the mandates of the Fourth Amendment. At the time the affiants first came to the door at 2816 Parker Street and before they had obtained the warrants, there was no response to their knocks. They could, however, see the television set was on. They concluded someone was there but their requests were being ignored. The fact that the television set was going is verified by police reports of statements of a brother of Rice and a companion who appeared at 2816 Parker Street while the place was under surveillance. These persons explained their appearance by stating they thought the place was being burglarized. This occurrence highlights the possibility of removal of the explosive material. The bombing and the items of information listed (1) through (9) above indicate exigent circumstances which might possibly have justified the search even without a warrant in the light of the highly dangerous nature of the material

and the possibility of continued bombings if the suspected explosives were not seized. Nonetheless the officers took the time to apply for a search warrant even though they might have entered the premises justifiably under the terms of the warrant for the arrest of Duane Peak for whom they were also looking at that time.

This opinion should in no wise be interpreted by law enforcement officers as a relaxation by this court of the rules laid down for us in Mapp and Ker. Search pursuant to warrant is to be much preferred to search without warrant, and a warrant should be applied for absent the exceptions applicable to exigent circumstances and other recognized exceptions. Affidavits in support of warrants should be as inclusive, accurate, and complete as is reasonably possible.

II.

As previously noted, Poindexter was arrested pursuant to warrant on August 22, 1970, and taken to jail. On August 24, 1970, his cothing was taken from him and he was given jail clothing. Shortly thereafter on the same day the clothing was delivered to Treasury Department agents. Following the search of 2816 Parker Street a warrant was issued for the arrest of Rice. He thereafter voluntarily on August 27, 1970, came to the jail, and was placed under arrest. His clothing was also taken from him and shortly thereafter on the same day it was given to Treasury Department agents. In the case of each of the defendants the clothes were taken to Washington, D. C., and analyzed by government chemists, and traces of dynamite were discovered. Each defendant moved to suppress the results. The motions were denied.

It is contended that Rice' arrest was illegal because it was based upon an unlawful search of 2816 Parker Street. This contention has already been disposed of. It is also contended that the examination of the clothing was in violation of the Fourth Amendment stand-

ards against unreasonable search and seizure because the search and scientific examination of it subsequent to arrest was not an incident of the arrest, and because there was no search warrant.

Rice relies primarily upon Brett v. United States, 412 F. 2d 401 (5th Cir., 1969). In that case the court, in a two to one decision, held that a search of the suspect's clothing without warrant 3 days after his arrest and the time his clothing was taken from him violated the Fourth Amendment and that the evidence should have been suppressed. No cases of the United States Supreme Court directly applicable are cited. The State relies upon Golliher v. United States, 362 F. 2d 594 (8th Cir., 1966). In that case, the court said: "Subsequent to appellants' arrest, they were relieved of their clothing. The clothing was subjected to scientific tests which disclosed microscopic particles matching particles taken from a bag discovered by officers at the scene of the offense." We are persuaded to follow the decision of the court in Golliher for the reasons which are set forth in the following extracts from that opinion: "The Fourth Amendment does not clearly delineate between searches that are legal and those that are illegal. It only prohibits the unreasonable with each particular case being decided on its own facts and circumstances. Ker v. State of California, 374 U. S. 23, 33, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); Rios v. United States, 364 U. S. 253, 255, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); Frank v. State of Maryland, 359 U. S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959). Applying this doctrine to an accused we can see nothing unreasonable about seizing from a validly arrested person, evidence that is intimately connected with the crime for which he is arrested. United States ex rel. Boucher v. Reincke, 341 F. 2d 977 (2 Cir. 1965); United States v. Pisano, 193 F. 2d 361 (7 Cir. 1951). In such a situation the accused is already subject to a general search incident to his arrest for such things as weapons, instrumentali-

ties, and fruits of the crime. Therefore, it is not a question of whether or not we shall allow a search, for the search already has the sanction of the law. It is only a question of whether evidence may be seized during the search. Such a seizure of evidence from an accused already in legal custody, therefore, will not generally subject the accused to any burden or indignity that he has not already suffered. The search allowed is limited to objects under the accused's immediate control and only allows seizure of evidentiary matter pertaining to the crime for which the accused was arrested. This carefully circumscribed seizure, limited in space and subject matter, is certainly distinguishable from a general warrant or the general exploratory search of one's personal effects in the sanctity of his home condemned by Gouled and Lefkowitz. As far as an accused is concerned, we do not believe such a seizure is an unreasonable infringement upon his personal rights.

"In making the determination of what searches are reasonable we must also weigh society's interest in continuing to allow such searches. We first note that scientific examination of dust particles, paint chips, blood stains, etc., is a widespread and necessary part of scientific police investigation. Were we to deny enforcement officials the right to gather this evidence from an accused actually in custody, a necessary weapon in the arsenal of detection would be largely destroyed. In recent years the Supreme Court has announced Constitutional principles that necessarily de-emphasize the use of interrogation, and, at the same time, supposedly encourage scientific investigation. Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); Mallory v. United States, 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957). As a practical matter we cannot possibly insist that enforcement officials rely upon scientific investigation and at the same time deny them an integral part of this scientific

potential. True, we must be diligent in our protection of the basic rights of an accused, but likewise we must not be derelict in protecting society from the ravages of criminal activity. We must be extremely careful not to completely disarm the enforcement officials of the weapons necessary to maintain order, which in turn would leave us all at the mercy of the unhindered criminal. Were we to uphold appellants in this case the bloody shirt worn into the police station by the murder suspect would be kept from the eyes of the jury. To us this would be deplorable folly. Therefore, we do not propose to initiate a rule that would dictate such a patently unjust result. . . .

"Although the Constitutional issue was not raised, we recently approved the seizure of the arrested persons' clothing and the admission of scientific comparison evidence found thereon. McNeely v. United States, 353 F. 2d 913 (1965). Even when presented with the Constitutional issue, all the cases of which we are aware have specifically upheld, on various grounds, the validity of seizing the clothing worn by the arrested individual and subjecting the same to scientific tests later admitted into evidence. Robinson v. United States, 109 U. S. App. D. C. 22, 283 F. 2d 508 (1960) cert. denied 364 U. S. 919, 81 S. Ct. 282, 5 L. Ed. 2d 259; Whalem v. United States, 346 F. 2d 812 (D. C. Cir. en banc 1965) cert. denied 382 U. S. 862, 86 S. Ct. 124, 15 L. Ed. 2d 100; United States v. Guido, 251 F. 2d 1 (7 Cir. 1958) cert. denied 356 U. S. 950, 78 S. Ct. 915, 2 L. Ed. 2d 843; Nelson v. Hancock, 239 F. Supp. 857 (D. N. H. 1965); United States v. Margeson, 246 F. Supp. 219 (D. Me. 1965); State v. Menard, 331 S. W. 2d 521 (Mo. 1960); State v. Phillips, 262 Wis. 303, 55 N. W. 2d 384 (1952); Sheppard v. State, 394 S. W. 2d 624 (Ark. 1965); People v. Shaw, Cal. App., 47 Cal. Rptr. 96 (1965); State v. Post, 255 Iowa 573, 123 N. W. 2d 11 (1963). Because of the reasons stated above, we feel it is imperative that we follow this long list of authority. It is our

conclusion that the clothing of appellants was validly seized as an incident to their lawful arrest and that the admission of the evidence found thereon did not violate their rights under the Fourth or Fifth Amendment."

As to Poindexter, it is further argued that his arrest was unlawful because the warrant for his arrest was issued without probable cause and therefore the seizure or taking of his clothing was likewise unlawful. He relies upon Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306, decided March 29, 1971, where the Supreme Court of the United States held that a sworn complaint alleging the commission of a crime was not a sufficient basis to issue an arrest warrant and that the judicial officer issuing the warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant *or* that the officers themselves have acquired additional information which is corroborative of the complicity of the arrestee in the crime.

The factual information in the hands of the police before the search of 2816 Parker Street on August 22, 1970, which we have previously listed, was in their hands before Poindexter's arrest on August 22, 1970, and would justify an arrest of both Poindexter and Rice.

In Whiteley v. Warden, *supra,* the sole basis of the complaint and warrant was the tip of an informer. The law officers had no independent corroborative information. Here the police had additional information which was corroborative of Poindexter's complicity and gave probable cause for his arrest.

The scientific examination of the clothing of the defendants taken from them shortly after their arrest did not violate the Fourth Amendment.

III.

Duane Peak testified at the trial that he did not intend to kill or maim a police officer and when he left the suitcase at 2867 Ohio Street he did not arm it, but his purpose was merely to frighten the officers when

they found it in the hope they would then treat black people better. The defendants argue that this would permit the jury to find Duane Peak was guilty of homicide less than first degree murder and that their guilt could be only derivative as alleged accessories before the fact. They argue, therefore, that the following instruction was in error, to wit, "If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him," because under the law the aider cannot be guilty of a crime of greater degree than the principal.

The argument on this point in the brief is well done, but we do not believe it is valid. The evidence was sufficient to establish a common design to commit murder in the first degree. The fact that the evidence would permit the jury to find that Peak had changed his mind as to his purpose and changed his intended actions (which changes if made were never communicated to the defendants) and so to find that he was guilty only of homicide less than first degree would not change the degree of the instigators' guilt if there was the necessary intent and premeditation on their part. See, 40 C. J. S., Homicide, § 9e(3), p. 848; 22 C. J. S., Criminal Law, § 106, p. 297; Red v. State, 39 Tex. Cr. 667, 47 S. W. 1003; State v. Lord, 42 N. M. 638, 84 P. 2d 80; Fleming v. State, 142 Miss. 872, 108 S. 143; People v. Blackwood, 35 Cal. App. 2d 728, 96 P. 2d 982.

Under the Nebraska statute the common law distinction between principal and accessory before the fact, or aider and abettor, has been abolished and the instigator is tried as a principal. § 28-201, R. R. S. 1943. At common law an instigator not personally present at the crime was called a principal in the second degree. In such cases the intent of the instigator governs his degree of guilt. State v. Lord, *supra;* Red v. State, *supra.* The instruction was not in error.

IV.

Both defendants assign as error the admission into

evidence over their objections of certain newsletters of the United Front Against Fascism and the National Committee to Combat Fascism (exhibits 14, 16, 17, 18, 19, 57, and 58). This assignment has several facets pertaining to motions to strike and for mistrial, as well as the claim that the admission of the exhibits is the source of prejudice to the defendants in the denial of the motion of the defendants for separate trials because of the possible use by the jury of statements or articles in the newsletters of one defendant against the other. In connection with the above it is asserted that instruction No. 21 is erroneous because it did not limit consideration of the statements or articles to the issue of intent.

The newsletters contained articles and statements appearing under the separate bylines of Rice and Poindexter, the general nature of which statements or articles, insofar as they are relevant and material, were expressions of hatred for the Omaha police and advocacy of the use of violence, including lethal violence, against them. These newsletters appeared and were publicly circulated during the several months immediately preceding the bombing.

The articles and statements were logically and legally relevant and material as those two terms are used in the law. 31A C. J. S., Evidence, § 158 et seq., p. 426 et seq. Threats and expressions of ill will are in homicide cases admissible to show intent, malice, or motive. Malice and motive are relevant and material not merely as evidence of intent but also on the issue of guilt or innocence as pointing to the identity of the perpetrator or perpetrators. 22A C. J. S., Criminal Law, §§ 607, 614, pp. 414, 422. Threats made by a person against a class are admissible in a prosecution for a crime committed against one of that class. State v. Dockery, 238 N. C. 222, 77 S. E. 2d 664.

The foundation for the admission of the exhibits is sufficient as to each defendant. That the newsletters

were the organs of the UFAF and NCCF is acknowledged by the defendants. The record completely supports the conclusion that the two defendants were among the organizers and key officers of the organization; that they did in fact compose the article appearing above their names; and that they had detailed knowledge of the contents of the newsletters because of their respective parts in the composition, construction, editing, and publishing of the letters including typing, cutting stencils, art work, and distribution. Poindexter denied authorship of one of the articles appearing under his name, but the general method of procedure in publication and the other evidence would support a contrary conclusion by the triers of fact. Both Poindexter and Rice testified on their own behalf and each, of course, was afforded an opportunity to cross-examine the other.

Instruction No. 21 given by the trial court was as follows: "The State has introduced certain news letters into evidence and they have been received as evidence but it has been agreed by the parties that you are to consider as evidence only the articles written and the art work contained therein, that is related to the individual defendants. You may consider the news letters with that limitation in your deliberations." In this connection two claims of error are made. The first relates to the language, "it has been agreed by the parties," and the second with the reference to the words, "related to the individual defendants." With reference to the first, the argument is that since the record contains no evidence of an agreement by the parties this permitted the jury to think the defendants had withdrawn their objections to the exhibits and consented to the jury considering them. In this connection we point out the evidence justified the jury in considering the pertinent articles and art work. Admissibility is a question for the court, not the jury. We can perceive no error on account of the language used even if inaptly chosen.

With reference to the second claimed error, it would appear that the language, "that is related to the individual defendants," is not as clear as it might have been, but when taken in connection with instructions Nos. 28 and 29, it seems clear to us no prejudice resulted. This portion of the instruction would appear to mean that articles or art work not authored by the defendants were not to be considered. Instruction No. 29 is NJI No. 14.54 which requires the jury to separately consider the guilt or innocence of each defendant and to consider against each defendant only the evidence which applies to him. Instruction No. 28 is in part as follows: "You are instructed that where the evidence shows a common plan, arrangement or design between two or more persons, evidence as to an act done or a statement made by one is admissible against all, provided the act be knowingly done and the statement be knowingly made during the continuance of the arrangement between them, and in furtherance of an object or purpose of the common plan or arrangement." This instruction also left to the jury the determination whether there was a common plan or design to commit the crime. Instruction No. 28 is of course correct. State v. Watson, 182 Neb. 692, 157 N. W. 2d 156. Instructions must be considered as a whole, and when so considered and they fairly reflect the law, there is no error.

In connection with the claimed error as to instruction No. 21 and the failure of the trial court to grant the motion for separate trials, the defendants rely upon Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476. The principles of this case appear not to be applicable because as we have noted each defendant testified and was subject to cross-examination by the other. In Bruton one defendant did not testify and his confession or admissions implicating his codefendant were used against said codefendant. This the court held was a denial of the constitutional right to confrontation and could not be cured by a cautionary

instruction. Bruton by its terms appears to apply only to confessions and admissions by one codefendant when used against the other. In this case there was no denial of the constitutional right to confrontation and cross-examination. Also the articles authored by each do not by their contents implicate the other.

One article in one of the exhibits is purportedly jointly authored by both defendants and as to this what we have said in the fourth preceding paragraph is applicable. The jury would be justified from the evidence in finding that it was in fact jointly authored by the two defendants.

There was no error in denying the motion to sever. See, A. B. A. Standards Relating to Joinder and Severance, Approved Draft, 1968, Standard 1.2(a), p. 5, and commentary, p. 14, and Standard 2.2, p. 7, and commentary, p. 29; § 29-2002, R. R. S. 1943. We recognize, of course, that some Nebraska cases may no longer be viable in the light of Bruton v. United States, *supra*, where an out-of-court admission or confession by one defendant is being used against the other without right of confrontation and cross-examination.

The newsletters themselves contain much that is irrelevant and of that most is wholly and simply irrelevant and could not support any claim it was prejudicial. The court when it admitted the newsletters into evidence indicated that irrelevant material and inadmissible items would be excised before being shown to the jury. It appears this was not done. We are therefore called upon to consider the question whether the admission of some of these items through apparent oversight constituted prejudicial error requiring a reversal and new trial.

The most prejudicial articles and the relevant and material articles are those purportedly authored by the defendants, and dealt with hate of the police and the advocacy of violence against them.

Some examples of the irrelevant material purportedly

authored by one or the other of the defendants or by others and which are at least arguably prejudicial are the following: (1) An article purportedly written by Rice attacking racism at North High School and suggesting that if the racists did not understand the logic of words, ". . . maybe they will understand the logic of not having a house or having a burning car." (2) Unsigned articles advocating overthrow of the government. (3) Disclosure of a purported plan by the United States, called the "King Alfred Plan," to use racial unrest as an excuse for a racial war and internment in the concentration camps of racial minorities. The admission of such items into evidence was clearly error and had no place in the trial of these cases.

In determining whether or not this constituted prejudicial error we consider the following: (1) The fact that the relevant and material and admissible articles purportedly authored by the defendants were of a far more virulent and prejudicial nature than any of those erroneously admitted. (2) The strength of the evidence of guilt. About this more will be said when we consider the assignment related to the sufficiency of the evidence to sustain the verdict. (3) The cautionary instructions, No. 21 and No. 28, given to the jury. (4) The great unlikelihood the jury would base its finding of guilt and consequently impose a sentence of life imprisonment upon matters which were not indicative of the guilt of the defendants of the particular crime with which they were charged.

It seems unlikely to us that the admission of the irrelevant statements reaches the dimension of the constitutional error, but nonetheless in accordance with the standards declared by the Supreme Court of the United States in Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A. L. R. 3d 1065, we have concluded the error was harmless beyond a reasonable doubt. In so doing we have applied the same standard of reasonable doubt that this court has ap-

proved as being applicable to the burden of proof of guilt in criminal prosecutions. NJI No. 14.08. This standard seems to conform to and be compatible with that announced in Chapman. We conclude that there is no reasonable possibility of prejudice on account of the failure to delete the irrelevant portions of the newsletters. We have an abiding conviction to a moral certainty that the jury would have convicted Rice irrespective of the irrelevant statement attributed to him and which we have specifically mentioned. The possibility of prejudice to Poindexter is even more remote.

V.

We now turn to the final assignment of error made by Poindexter that the evidence was insufficient to sustain the verdicts. The assignment is not well taken and we substantiate this by very brief résumé of the trial evidence as it pertains to the two defendants, omitting evidence of motive and identity contained in the newsletters and which has been already adequately covered, but will again refer to the finding of the physical evidence in Rice' residence.

Duane Peak, the actual perpetrator of the crime, testified for the State. His testimony would permit the jury to find that the following is true. Peak joined the NCCF in November 1969, the headquarters of which at that time were 2 blocks from 2816 Parker Street. He participated in the activities of the organization until the time he went into hiding on August 17, 1970. His activities included writing for the newspaper, observing its making, selling newspapers, and serving as desk officer. He was well acquainted with Rice and Poindexter, knew their positions in the organizations, and knew their activities.

On August 10, 1967, Poindexter talked to Peak about making a bomb and told him, ". . . he had a beautiful plan to blow up a pig," meaning a policeman. They made arrangements that night to meet at the home of one of the members of the NCCF which they did

and then went to Rice' home. Peak then went with another member and obtained a suitcase which he took to Rice' house through the alley and back door where he was met by Rice and Poindexter. Inside they opened the suitcase. It contained a large quantity of dynamite. Poindexter furnished Peak with plastic gloves and the two of them removed part of the dynamite from the suitcase and placed it in a box which Rice took to the basement. Poindexter then made the bomb in the suitcase using the remaining dynamite and other materials. This was done in the presence of Peak and Rice. Rice furnished tools used in the manufacture. Peak identified the dynamite and the box found in the search at 2816 Parker Street. He identified the tools furnished by Rice. After the bomb had been manufactured inside the suitcase the lid of the suitcase was closed, locked, and put in Rice' bedroom. The following night Peak and Poindexter went to look at the vacant house at 2867 Ohio Street.

On the evening of August 16, 1970, Peak obtained the suitcase from Rice' home pursuant to arrangements which he had made with Rice a short time earlier. At the time he obtained it, Rice gave him tacks which Peak needed to fasten wires projecting through a hole in the suitcase so that the bomb would detonate when the suitcase was moved.

Peak described the route he took and delivery of the bomb to 2867 Ohio Street and his testimony is corroborated by several witnesses. He then made the 911 telephone call from a phone booth at 24th and Grace Streets and gave the operator the story of the woman's screaming at 2867 Ohio Street. Poindexter had earlier told him to do this. Peak was arrested on August 28, 1970.

In addition to the physical evidence found in the search of August 22, 1970, at 2816 Parker Street, Peak's testimony is corroborated by the following. Scientific examination of fragments gathered at 2867 Ohio Street

established the probable cause of the explosion. Scientific examination of a jacket taken from Poindexter disclosed particles of ammonia dynamite which is the type used in the bomb and the type found in Rice' basement. Like particles were found on Rice' pants. Scientific testimony indicated that Rice' pliers had been used to cut a bit of copper wire like that used in the bomb and found in the basement of 2865 Ohio Street, next door to 2867, where the wire had apparently been blown by the force of the explosion which essentially destroyed the house at 2867 and badly damaged that at 2865.

Both Poindexter and Rice were able to establish rather conclusively their whereabouts on the night of August 16-17, 1970, during the hours when the bomb was being planted and when the explosion occurred.

They denied the making of the bomb on August 10, 1970, or being with Peak at that time. Rice denied that Peak was at his home on the evening of August 16. Both denied any part in the making of the bomb, the bombing, or participating in any plan to commit the crime.

Questions of credibility are of course for the jury and not for the court. The evidence was clearly more than sufficient to support the verdict.

Since there was no reversible error the verdicts in both cases No. 38157 and No. 38188 are affirmed.

AFFIRMED.

SMITH, J., concurs in result.

MCCOWN, J., concurring in result.

I cannot agree that the affidavit involved here met standards previously applicable. The United States Supreme Court and this court have uniformly held that where informants are involved, an affidavit for a search warrant must inform the magistrate of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were; and (2) some of the underlying circumstances from which the officer concluded that the in-

formant was credible. See, United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684; State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85; State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21.

The majority opinion concedes that recitals in the affidavit that the police had been informed explosives were kept at the residence and defendants had said that explosives should be used against police officers would be insufficient standing alone. The opinion nevertheless validates an otherwise insufficient affidavit upon the theory that allegations of membership in a certain organization and the holding of office in such organization, together with an allegation the defendants advocated violence against police officers and that violence had occurred, somehow constitute "underlying circumstances" and cure the otherwise obvious defects. Whenever active membership in an organization which advocates violence against the police or any other group or segment of society, and a public expression of individual approval of such views, standing alone, become justification for the issuance of a search warrant whenever an incident of such violence occurs, the Fourth Amendment has lost its meaning.

I would place the decision on a different ground. At the time of making the affidavit for the search warrant, the police department had ample information to constitute probable cause for the issuance of the warrant, but much of the information was omitted from the affidavit. To apply the exclusionary rule under such circumstances exalts form over substance. Our cases should be modified to permit supplementing the affidavit at the hearing on a motion to suppress by evidence of additional information proven to have been known to the police at the time the affidavit was made and the warrant issued, but not set out in the affidavit. The facts here indicate the advisability of an ad hoc approach permitting some flexibility in the court's analysis of the individual circumstances of each case.

JOHN H. GAETH ET AL., APPELLEES, V. MARJORIE GAETH NEWMAN, APPELLANT.

199 N. W. 2d 396

Filed July 14, 1972. No. 38340.

1. **Gifts: Evidence: Undue Influence.** The burden of proof is upon the person asserting undue influence to prove by a preponderance of the evidence: (1) That the grantor, testator, or donor was a person who would be subject to such influence; (2) that there was an opportunity to exercise such influence; (3) that there was a disposition to exercise such influence; and (4) that the result was the effect of such influence.
2. **Gifts: Evidence: Undue Influence: Parent and Child.** The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.
3. **Gifts: Evidence: Trial.** Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift.
4. **Gifts: Evidence: Trial: Undue Influence.** Where the facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then a presumption of undue influence arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof.
5. **Evidence: Trial: Undue Influence.** Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence.
6. **Gifts: Deeds: Cancellation of Instruments: Undue Influence.** The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence invalidating a deed, and does not render the deed void or voidable, when the transaction is open, honest, and fair, or where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor.
7. **Gifts: Deeds: Undue Influence: Evidence.** In determining whether a presumption of undue influence has been rebutted, the court may consider whether the grantor has received independent advice.
8. ———: ———: ———: ———. The absence of independent advice means the absence of an opportunity to have independent advice, and it is not necessary that the acts of the grantor conform to such advice in order to validate the deed.

9. ———: ———: ———: ———. In order to establish undue influence invalidating a deed, there must be proof that the circumstances of the execution of the deed were inconsistent with any hypothesis but undue influence, which must be proved in connection with the conveyance in suit, and not with other things.
10. **Deeds: Acknowledgments: Evidence: Cancellation of Instruments.** Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment was false.
11. **Trusts: Contracts: Customs and Usages.** In the case of an informal trust the mingling of funds is proper if such is the understanding of the parties as shown by their agreement or by their custom.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Reversed and remanded with directions.

George O. Kanouff and Curtis Bromm, for appellant.

Haessler, Sullivan & Inbody, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

BRODKEY, District Judge.

This is an action brought by John H. Gaeth and Dennis D. Gaeth, as plaintiffs, against Marjorie Gaeth Newman, defendant, praying that a certain deed from Lydia Gaeth to the defendant, covering the west half of the southeast quarter of Section 3, Township 16, Range 8, Saunders County, Nebraska, be invalidated and set aside. There was no contention made that the grantor was mentally incompetent to make a valid conveyance, but it is claimed that the defendant obtained the deed because of undue influence. The trial court found generally in favor of the plaintiffs and vacated and set aside the deed in question, and defendant has appealed to this court.

Pertinent facts developed by the evidence are as follows: Henry and Lydia Gaeth were husband and wife

and were the parents of John H. Gaeth and Dennis D. Gaeth, the plaintiffs in this action, and also of Marjorie Gaeth Newman, the defendant. At the time of his death, Henry Gaeth owned 4 80-acre tracts of farm land in Saunders County, Nebraska, in joint tenancy with his wife, Lydia, and the parties also owned certain savings bonds. After the death of Henry Gaeth, and at the suggestion of her late husband's attorney, Lydia Gaeth gave each of her 3 children 80 acres of land, and also made each of the 3 children a joint tenant with her on ⅓ of the U. S. savings bonds. Thereafter, Lydia made a will leaving the 80 acres involved in this action to her 3 children but granting to the defendant, Marjorie Newman, the right to buy it for $350 per acre, or market value, if less. Defendant, Marjorie Gaeth Newman, together with her husband, Hillis, and their 3 children lived on the 80 acres in question owned by Lydia Gaeth, and farmed it on a percentage agreement. John H. Gaeth is a speech pathologist with a PHD degree and resides in Royal Oak, Michigan. The other son, Dennis D. Gaeth, lives in Chevy Chase, Maryland, and is the owner of the majority stock in a corporation. The contacts of the sons with their mother, after the death of the father, were limited to occasional visits, although there was a certain amount of communication between them by means of correspondence, directly and indirectly.

After the death of Henry Gaeth, his widow, Lydia, continued to live on the "home place," near the farm of her daughter, Marjorie. During that period, Marjorie had complete care and supervision of her mother while she was living alone at the home place, telephoned her daily, and checked on her welfare in a regular fashion. On July 9, 1967, the mother, Lydia, became ill and moved into the home of the defendant, where she lived until her death several years later, to be precise, on April 18, 1970. There was an agreement between the defendant and her mother that the defendant was to

use the mother's funds for her care and any other things that were needed. The plaintiffs also claim the existence of a family agreement between them, by which defendant was to take care of their mother, Lydia Gaeth, in consideration of receiving the interest on $45,000 in bonds owned by Lydia Gaeth and the plaintiffs and defendant jointly, the receipt of the social security payments of Lydia Gaeth, and also the use of the 80 acres involved in this case, free from the payment of any rent.

It appears that in October of 1967, Lydia Gaeth informed the defendant that she would like to have Marjorie have the 80 acres and directed the defendant to make arrangements with her attorney to prepare the necessary papers. According to the testimony of the defendant, she told her mother "to think it over," as the brothers John and Dennis might become angry, but her mother said that she was sure and wanted to do it. Defendant further testified that a week or so later, her mother again inquired about the matter and therefore the defendant called an attorney, Arthur C. Sidner, at Fremont, Nebraska, who was a former partner of the attorney who had formerly represented Henry and Lydia Gaeth on various matters prior to Henry Gaeth's death. Mr. Sidner made an appointment to see Lydia and the defendant for November 1, 1967. He also recommended that Lydia Gaeth have a physical examination before coming to his office, and he, himself, made an appointment for such examination with a Dr. Charlotte P. Seiver, who was Lydia's family doctor. On October 24, 1967, Dr. Seiver examined Lydia Gaeth, and on November 1, 1967, the defendant and her mother kept the appointment with the attorney, Arthur C. Sidner, who, at that time presented an instrument previously drafted by him, stating, in effect, that Lydia was giving the deed to the 80 acres to the defendant, who would take care of Lydia for her life, that the deed was not to be recorded, and further

that the defendant was to make a will that the income from the property would go to Lydia for her support and maintenance. Both Lydia and the defendant refused to sign the instrument; whereupon, Mr. Sidner asked the defendant to leave the room while he talked to the mother, Lydia, alone. On returning to the room, Mr. Sidner handed defendant the signed and executed deed and also prepared a will for Marjorie's signature which protected the maker, Lydia, if Marjorie should die first. The defendant did not record the deed to the property prepared by Mr. Sidner until after the death of her mother, and the plaintiffs had no knowledge of said deed until after their mother died, at which time attorney Sidner informed them of such deed. The defendant explains this failure to record the deed on the grounds that her mother requested that she not record the deed until after her death because of the possibility it would stir up strife and friction within the family, and for the further reason that in the original document prepared by the attorney, Sidner, which both defendant and her mother refused to sign, it was also provided that the deed to the defendant was not to be recorded. The original memorandum prepared by Mr. Sidner was received in evidence at the trial and appears to corroborate defendant's claim that the deed to the defendant was not to be recorded.

Other pertinent facts should be mentioned before discussing the main issue in this case, to-wit, whether or not defendant was guilty of undue influence in procuring the deed in question, and as claimed by the plaintiffs was guilty of the breach of the confidential or fiduciary relationship between the defendant and her mother, Lydia Gaeth. It appears that during the time Lydia was living at the home of her daughter, Marjorie, and while Lydia's affairs, financial and otherwise, were being taken care of by the daughter, Marjorie, and her husband, Hillis Newman, there had been a substantial amount of intermingling of funds, and com-

mon use of funds of the mother; and that, on occasion, some of these funds which were in a joint bank account, were not used strictly for the support and maintenance of Lydia only, but on certain occasions, were also used for purposes personal to the Newman family. Defendant's explanation of this course of procedure was that it was with the agreement and understanding of her mother and with her knowledge and consent. Evidence was also adduced by the plaintiffs, particularly by the son, John, the speech pathologist, to the effect that his mother suffered from what he termed "asphasic" speech, which was explained as being the loss of continuity of thought or forgetfulness in the middle of a sentence. The evidence of whether Lydia suffered from this ailment was conflicting, and, in any event, it would not necessarily affect the mental capacity of a grantor to execute a deed. As previously stated, the mental capacity of Lydia to execute the deed in question is not an issue in this case, except, and only to the extent, that it might make her susceptible to undue influence practiced upon her.

The foregoing appear to be the significant and controlling facts, gleaned from the reading of the voluminous record in this case. We must measure these facts against the applicable principles of law involved, and a summary of some of these principles will be helpful to an understanding of this case. Other facts will be alluded to from time to time to clarify the application of the legal principles involved. The propositions of law involved in this case are for the most part well settled. The principal issue involved, as framed by the pleadings in the case, is whether the defendant, Marjorie Gaeth Newman, obtained the deed to the property involved in this case by undue influence exerted upon the grantor, Lydia Gaeth, her mother. The law is well established that the burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence: (1) That the grantor,

testator, or donor was a person who would be subject to such influence; (2) that there was an opportunity to exercise such influence; (3) that there was a disposition to exercise such influence; and (4) that the result was the effect of such influence. Molholm v. Lynes, 185 Neb. 707, 178 N. W. 2d 566; Drew v. Hawley, 164 Neb. 141, 82 N. W. 2d 4; Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117.

The law is also well established that the affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor. Conry v. Langdon, 181 Neb. 53, 146 N. W. 2d 782; Parkening v. Haffke, *supra;* Hacker v. Hoover, 89 Neb. 317, 131 N. W. 734; 26 C. J. S., Deeds, § 64, p. 777.

In this case the plaintiffs claim and the defendant concedes that at the time of the conveyance involved herein, a confidential relationship existed between the defendant and her mother, Lydia Gaeth. Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. When the burden is met, the burden then rests on the alleged donee to show the validity of the gift. By virtue of defendant's admission of the existence of a confidential relationship with her mother, the burden of evidence is cast upon her to show that the deed from her mother was not tainted with undue influence but was the deliberate and bona fide act of the grantor. Molholm v. Lynes, *supra;* Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645. This court has stated that where the facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then a presumption of undue influence arises, and the burden of going forward with

the evidence rests upon the grantee to show the bona fides thereof. Cunningham v. Quinlan, 178 Neb. 687, 134 N. W. 2d 822. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. 25 Am. Jur. 2d, Duress and Undue Influence, § 46, p. 406. Moreover, the mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence, invalidating a deed, and does not render the deed void or voidable, where the transaction is open, honest, and fair, or where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor. 26 C. J. S., Deeds, § 63, p. 771. As a general rule, to render such a transaction valid, it is necessary to show only that the party alleged to have been influenced had competent or disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise. 25 Am. Jur. 2d, Duress and Undue Influence, § 46, p. 406. One of the most important elements considered by the courts in determining whether a presumption of undue influence has been rebutted is whether the grantor has received independent advice, and there is a theory of law that removes the cloud of undue influence from a deed on a showing that the one allegedly overpersuaded had independent advice. 26 C. J. S., Deeds, § 62, p. 766. The importance of independent advice has also been recognized by this court. In the case of Broeker v. Day, 124 Neb. 316, 246 N. W. 490, in connection with an action to set aside a deed for undue influence executed by a man of advanced age and considerably broken in health, this court specifically noted at page 320: "He sought no independent advice." It should be pointed out, however, that "absence of independent advice" means the absence of an

opportunity to have independent advice; and certainly where the grantor has received independent advice, his act need not conform to such advice in order to validate the deed. In discussing this rule, the Supreme Court of Oklahoma stated in its opinion in the case of Montgomery v. Willbanks, 198 Okla. 684, 181 P. 2d 240 (1947): "It is to be observed that the rule does not go so far as to say that the grantor must make his acts conform to the advice. If the rule did require that, any person who desired to make a deed under circumstances similar to this would be bound to do as he was advised and his ignoring proper independent advice would be seized upon as an evidence of lack of business capacity or an unsoundness of mind. The independence of an individual to act as he chooses with respect to the disposition of his property is too valuable to be restricted by any such rules."

The evidence adduced by the plaintiffs to establish their claim of undue influence on the part of the defendant consists largely of circumstantial evidence and evidence of suspicious circumstances. While circumstantial evidence may be sufficient, the circumstances must not be equally consistent with some other rational theory deducible from the facts proved. 26A C. J. S., Deeds, § 211, p. 112. In order to establish undue influence invalidating a deed, there must be proof that the circumstances of its execution were inconsistent with any hypothesis but undue influence, which must be proved in connection with the conveyance in suit, and not with other things. Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586; 23 Am. Jur. 2d, Deeds, § 148, p. 194. Of all the evidence adduced during the trial, it appears that the most persuasive upon the question of whether the defendant has sustained her burden to establish that the deed she received was not the result of undue influence on her part was that given by attorney, Arthur C. Sidner, who testified at the trial by deposition. While Mr. Sidner had not person-

ally represented Henry and Lydia Gaeth previous to this occasion, his deceased partner had represented them, and Mr. Sidner was familiar with the Gaeths and their property. When called by the defendant for an appointment for Lydia Gaeth and her daughter, he immediately sensed the problems that might arise and the trouble which might ensue as a result of Lydia preferring one of her children over her others. As a matter of precaution, he made an appointment with Lydia Gaeth's personal physician for a medical examination of Lydia, obviously to fortify himself as to her mental and physical condition, should the question subsequently arise. The doctor to whom he referred Mrs. Gaeth for an examination, thereafter reported that Lydia Gaeth was physically and mentally competent to sign a deed. Subsequent to that examination, Lydia and the defendant came to Mr. Sidner's office in connection with the preparation and execution of the necessary instruments. The following questions and answers taken from Mr. Sidner's deposition admitted in evidence at the trial are enlightening:

"Q- You testified Mr. Sidner, that you had known Lydia Gaeth for about twenty-five years. Do you have an opinion based upon that long acquaintanceship with Lydia Gaeth as to whether or not she seemed to be a woman of courage and character that could or could not be easily influenced?

"A- I have an opinion.

"Q- And what is that opinion?

"A- It is my opinion that she was a rather strong-willed woman and I would say couldn't be easily influenced. Influence is a peculiar thing where you are feeling sorry for a child. I am sure that even strong-willed people can feel sympathy for a child and make them gifts or otherwise taken advantage of.

"Q- Even a weak-willed person will do that?

"A- Yes, but I would say she was a strong-willed person and not subject to influence."

Attorney Sidner further testified that on November 1, 1967, during the discussion he had with Lydia, he had an opportunity to observe her and listen to her, and in his opinion she was very competent. In answer to a question as to whether he would say Lydia was lucid and knew her own mind, Mr. Sidner replied: "A- She certainly knew her own mind. She didn't follow my recommendations." Mr. Sidner also testified that on that occasion Lydia had told him that Marjorie was taking such good care of her, and had quit a job to do so, and that she, Lydia, felt certain obligations in connection with it, which was one of the reasons she was giving Marjorie the land; but another reason for so doing was because she felt sorry for Marjorie because of her "hard luck."

It must also be noted that after Mrs. Gaeth signed the deed prepared for her by Mr. Sidner, she acknowledged it to be her voluntary act and deed before Mr. Sidner, acting in his capacity as a notary public. This court has held that the evidence of the attorney who prepared the deed, of the notary who took the acknowledgment and of the witnesses to the execution of the deed alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly, and voluntarily, is entitled to great weight. Little v. Curson, 114 Neb. 752, 209 N. W. 737; Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311. In the case of Kucaba v. Kucaba, *supra*, this court stated: "In addition thereto, we have the testimony and the certificate of the notary before whom the deed was signed and acknowledged. 'Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.' (Citing cases)."

The testimony of the attorney Arthur C. Sidner, clearly substantiates the opinion expressed by most of the other witnesses who testified at the trial that the grantor, Lydia Gaeth, was a strong-willed person, not easily subjected to influence, and knew her own mind. They also substantiated the general tenor of the evidence to the effect that Lydia Gaeth was grateful to her daughter for her kindnesses to her, and also felt sorry for her because of the hard luck that she and her husband had experienced in life. It was also important because it clearly shows that Lydia Gaeth not only had the opportunity to obtain advice, but actually did obtain it; and while her attorney would have preferred that she executed the original document he drafted for her, nevertheless when she made it clear that she did not wish to do so, he acceded to her demands and drafted the instrument in the form she desired it. This was done after a private conversation with Lydia Gaeth out of the presence of her daughter, the defendant herein. As indicated by the previous citations of authority, the fact that she did not elect to follow the advice given her in no way detracts from the fact that she *had* advice. Her determination to follow her own wishes in the matter indicates her lack of susceptibility to influence on the part of others. As shown by the authorities heretofore cited, the fact she had a feeling of gratitude toward her daughter for the kindnesses demonstrated to her during her life, does not in any way raise a presumption of undue influence on the part of said child.

One point needs further commenting upon. Plaintiffs make much of the fact that the defendant and her husband commingled the funds of Lydia Gaeth with those of their own, and on occasion apparently used some of said funds for their own purposes, notwithstanding the fact of the fiduciary relationship existing between them. As previously stated, it was the testimony of the defendant that her mother, whose property it was, had agreed and consented to the arrangement and had

told her that she might use the funds for whatever purposes were necessary. It must be remembered that the arrangement between Lydia and her daughter was of a very informal nature. The rule is that in the case of an informal trust the mingling of funds is proper if such is the understanding of the parties as shown by their agreement or by custom. Pike v. Triska, *supra.*

In this case there is a total lack of evidence showing any urging by Marjorie to secure the execution of the deed. As a matter of fact, the evidence shows that the transaction was handled by Mrs. Gaeth in a private conference with her attorney, Mr. Sidner. It appears from the evidence that what Marjorie did was to take the necessary steps to carry out the express wishes of her mother, and that she has satisfactorily rebutted any presumption of undue influence which might have arisen by reason of their personal relationship. The evidence adduced at the trial of this case is as consistent with the above hypothesis as it is with the hypothesis of undue influence on the part of the defendant—even more so. In our opinion there is no evidence in the record sufficient to establish any of the required elements of proof of undue influence previously enumerated, except that of "opportunity," which in itself is insufficient. It is not, nor should it be, the purpose of the court to question the righteousness of a conveyance, but only to determine whether it is the voluntary act of the grantor. As this court has stated: "'Whether her action was right or wrong is not a question for us to decide. The court is not the keeper of her conscience. The question for us to determine is whether she acted freely and voluntarily in the matter. If she did, her action was final and is binding upon the court, no matter what we may think of its justice or equity.'" Broeker v. Day, *supra.*

From a careful consideration of all the evidence, we conclude that the trial court erred in holding that the deed in question was invalid and the result of undue

influence on the part of the defendant. The judgment of the district court is therefore reversed, and the cause remanded with directions to enter judgment in favor of the defendant and against the plaintiffs in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ARDENE I. SEES, APPELLANT, V. WAYNE W. SEES, APPELLEE.
199 N. W. 2d 496

Filed July 14, 1972. No. 38380.

1. **Divorce: Alimony: Parent and Child.** The division of property and allowance of alimony and child support in divorce actions are always to be determined by the facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable.
2. **Divorce: Evidence: Appeal and Error.** In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court will be given great weight, and will not be disturbed on appeal unless good cause is shown.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Fisher & Fisher, for appellant.

Edmund Hollstein, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is a divorce action by plaintiff, Ardene I. Sees, against the defendant, Wayne W. Sees. The district court granted a divorce and custody of the minor child to the plaintiff. The plaintiff has appealed solely on the ground that the provisions for property division and child support were insufficient.

Plaintiff and defendant were married in 1961 and

are the parents of one daughter born in 1962, who was 9 years of age at the time of trial. The plaintiff was a beauty operator. She was 39 years old. She had two children by a former marriage for whom she received veteran's or social security payments of $248 per month. She had purchased the residence in which the parties lived. The house was in Gordon, Nebraska, and title was in her name. Evidence as to the value of the residence ranged from $16,000 to $26,000. She operated her beauty shop in the residence. During the 10-year period of the marriage, the plaintiff's net income from her beauty shop operation had reached a peak of $2,035.28 in 1966, but for the 3 years preceding the trial, had averaged a little less than $125 a month.

The defendant was a 46-year-old farmer who owned no land but farmed on 470 acres of land located near Gordon under a partnership arrangement with his parents who owned and lived on the land. The defendant's net income from his farming operations had varied from a loss of $1,197.97 in 1964 to a profit of $6,865.04 in 1969. His average net income for the 3 years preceding trial was approximately $6,250 per year plus an average capital gain from sale of breeding stock of slightly over $800 per year. His financial statement to his bank in July of 1971 showed a net worth of a little over $20,000, which included a pickup truck valued at $1,875 and a Ford automobile valued at $2,550, both of which were jointly owned by plaintiff and defendant. The balance of defendant's assets consisted of livestock and farm machinery.

There were constant financial disputes during the marriage which were the principal basis of the charge of extreme cruelty. The evidence is contradictory and confusing as to expenditures made by the parties. The plaintiff did pay the loan payments and taxes on the residence. Testimony as to the cost of maintaining the 9-year-old daughter was also contradictory, disordered, and confusing.

The court quieted title to the residence in the plaintiff, subject to existing indebtedness. The court also awarded all of the household goods and furnishings and the 1970 Ford automobile to the plaintiff. The defendant was awarded his livestock, equipment, hay, and personal property used in connection with the farm operation, including the pickup truck. He was also required to pay his indebtedness of $3,000 to the bank, all household debts of the parties incurred prior to April 2, 1971, and any medical or dental expenses of the plaintiff or the daughter to date of trial. The decree fixed the amount of child support for the minor daughter at $75 per month and also directed that the defendant was to maintain a medical hospitalization policy for the child. Attorney's fees of $350, plus costs, were also assessed to the defendant.

The division of property and allowance of alimony and child support in divorce actions are always to be determined by the facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. See Foltyn v. Foltyn, 180 Neb. 42, 141 N. W. 2d 433. The parties agree on the rules, but disagree in their interpretaton of the facts.

Plaintiff contends that the trial court erred in failing to grant a new trial on the grounds of newly discovered evidence. Two months following the trial, an affidavit of plaintiff's brother was filed stating that there was a large quantity of hay on the farm operated by the defendant. The affiant had been a witness at the trial. Neither the affiant nor the plaintiff suggest any reason whatsoever why complete evidence as to the extent and value of the defendant's interest in any hay was not easily and fully available at time of trial. The action of the district court in refusing a new trial on the grounds of newly discovered evidence was clearly correct.

Plaintiff complains also that the child support of $75 per month is totally inadequate. While the evidence

was to some degree conflicting and confusing, we believe the trial court was in a better position to assess the local situation with respect to costs, as well as to apply that knowledge to the facts and circumstances of this case. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court will be given great weight, and will not be disturbed on appeal unless good cause is shown. See, Buchanan v. Buchanan, 186 Neb. 89, 180 N. W. 2d 886; Martin v. Martin, *ante* p. 393, 197 N. W. 2d 388.

The determinations of the district court were correct and are affirmed. The plaintiff is allowed a fee of $350 for the services of her attorney in this court.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent herein because I feel the award to the plaintiff, and the child support, were inadequate on the record.

SCHOOL DISTRICT OF SEWARD EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. SCHOOL DISTRICT OF SEWARD, IN THE COUNTY OF SEWARD, STATE OF NEBRASKA, ALSO KNOWN AS SCHOOL DISTRICT OF SEWARD, APPELLANT.

199 N. W. 2d 752

Filed July 21, 1972. No. 38267.

1. **Constitutional Law.** In construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished.
2. ———. This court has recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for a useful purpose. Constitutional provisions should receive even broader and more liberal con-

struction than statutes, and constitutions are not subject to rules of strict construction.

3. ———. We are indebted to the suffrage of the people for the adoption of all amendments submitted and indeed for the adoption of the original Constitution which such amendments changed. From this fact it is patent that, where the language employed is plain, the courts should accord to it the meaning which obviously would be accepted by the layman.
4. **Constitutional Law: Public Service Commissions.** In adopting the constitutional provision authorizing an Industrial Commission, it was made an independent part of the Constitution of Nebraska and not as an amendment to Article II.
5. **Schools and School Districts.** A school district in this State is a creature of statute and possesses no other powers than those granted by the Legislature.
6. **Schools and School Districts: Legislature.** The Legislature has plenary power and control over school districts, including provision for the appointment or election of governing bodies thereof. Consequently, it may provide limitations on any authority to be exercised by a school board.
7. **Statutes.** All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
8. **Schools and School Districts: Legislature: Courts: Constitutional Law.** The Legislature has complete control of the actions of school boards. Whether or not the Legislature has acted wisely in the premises is not a matter for judicial determination. The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power.
9. **Schools and School Districts: Administrative Law.** While there are many nebulous areas that may overlap working conditions, boards should not be required to enter negotiations on matters which are predominately matters of educational policy, management prerogatives, or statutory duties of the board of education.
10. **Court of Industrial Relations: Administrative Law.** The Court of Industrial Relations is an agency within the purview of the Administrative Procedures Act.
11. **Court of Industrial Relations: Administrative Law: Agency of State.** The fact that the Court of Industrial Relations has certain legislative and judicial powers which may distinguish it in certain respects from other agencies which exercise purely administrative powers does not prevent it from being an agency of the State in a broad sense.

Appeal from the Court of Industrial Relations. Affirmed.

Blevins, Bartu & Blevins, for appellant.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

A. C. Sidner, Thomas F. Dowd, William A. Harding, Jack G. Wolfe, Nelson, Harding, Marchetti, Leonard & Tate, and L. Bruce Wright of Cline, Williams, Wright, Johnson & Oldfather, for amici curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is a labor case brought by plaintiff association as representative of the certificated teachers employed by defendant, School District of Seward. The Court of Industrial Relations, hereinafter referred to as court, ordered the defendant to negotiate with plaintiff on wages and conditions of employment. The parties negotiated all of the issues to settlement except a salary schedule. After trial, the court established a salary scale by increasing the 1970-71 base pay $100. Defendant perfected this appeal.

Defendant principally raises the question of the constitutionality of the legislation. Additionally, it questions the court's authority over administrative matters which may be included as conditions of employment; the compelling of negotiation and arbitration; and the right to set wages for school employees.

The provisions of the Constitution of Nebraska which could be pertinent are as follows:

Article I, section 4, provides in part: "* * * it shall be the duty of the Legislature to pass suitable laws * * * to encourage schools and the means of instruction."

Article II, section 1, provides: "The powers of the government of this state are divided into three distinct

departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Article III, section 1, provides in part: "* * * the legislative authority of the state shall be vested in a Legislature * * *."

Article VII, section 6, provides: "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."

Article VII, section 14, provides in part: "The State Department of Education shall have general supervision and administration of the school system of the state and of such other activities as the Legislature may direct."

Article VII, section 15, provides in part: "The State Board of Education shall be composed of eight members, * * *. * * * Their duties and powers shall be prescribed by the Legislature * * *."

Article XV, section 9, provides: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission."

The first question requiring consideration herein is the meaning of Article XV, section 9, Constitution of Nebraska. Was it intended to operate as an exception to Article II, and does it create a commission with legislative, executive, and judicial powers? In Engelmeyer v. Murphy (1966), 180 Neb. 295, 142 N. W. 2d 342, we

said: "In construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished."

Article XV, section 9, came into our Constitution in the Constitutional Convention of 1919-1920. An examination of the proceedings of that Convention suggest that the implementation of the amendment by the legislation being questioned is in accord with the intention of its architects.

Substantially all of the work on the judicial article had been completed before Proposal No. 333, which became this section, was presented on the floor of the Convention. The Convention had altered the judicial article to permit the Legislature to establish courts inferior to the Supreme Court. The Committee on Industrial Conditions presented a substitute proposal for the four proposals originally introduced at the Convention. The substitute proposal was considered on the floor of the Convention, and then referred back to a joint committee of the Industrial Courts Committee and the Miscellaneous Subjects Committee for combination with the trade regulation proposal. This joint committee submitted Proposal No. 333. In submitting the proposal, the committee report states: "It is our judgment that a tribunal in the form of a commission with combined administrative, legislative and judicial powers, is the proper governmental agency to be entrusted with the powers and duties to be granted, and prescribed, the judicial power to extend to making findings and orders, leaving measures of enforcement by penalties or summary process with the judicial department of the state government."

In School Dist. No. 8 v. State Board of Education (1964), 176 Neb. 722, 127 N. W. 2d 458, we held: "It is the general rule that the Legislature may not lawfully delegate its legislative powers to an administrative agency. An exception to the rule obtains when a

delegation of legislative power is authorized by the Constitution.

"Article VII, section 14, of the Nebraska Constitution authorizes the grant of administrative and legislative powers to the State Department of Education, subject to implementation and limitation by the Legislature in accordance with Article VII, section 15, of the Constitution."

In Anderson v. Tiemann (1967), 182 Neb. 393, 155 N. W. 2d 322, after holding the Legislature had not made an unconstitutional delegation of legislative power, we said, discussing the matter of separation of powers: "Basically the same issues are involved with respect to delegation of judicial power. Article V, section 1, of the Constitution, vests judicial power in the tribunals therein named but also gives to the Legislature the power to create other courts inferior to the Supreme Court. However, L. B. 377 does not create a court but does grant to a state official or administrative body quasi judicial powers. Powers of the same general nature and character are conferred upon many administrative bodies. Such duties are of a quasi judicial nature and yet such bodies are almost invariably held to be administrative. See Dawson County Irr. Co. v. McMullen, 120 Neb. 245, 231 N. W. 840. The conferring upon state agencies or officers, of executive or administrative functions requiring the exercise of quasi judicial powers, does not conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. This is particularly true where such powers and duties relate to matters which are peculiarly affected with a public interest and where provision is made for appeal from decisions of such officers or agencies to the courts."

In Anderson v. Tiemann, *supra*, we further said: "This court has also recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose. Con-

stitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction. Carpenter v. State, 179 Neb. 628, 139 N. W. 2d 541."

In State ex rel. Meyer v. State Board of Equalization & Assessment (1970), 185 Neb. 490, 176 N. W. 2d 920, we said: " 'We are indebted to the suffrage of the people for the adoption of all amendments submitted and indeed for the adoption of the original Constitution which such amendments changed. From this fact it is patent that, where the language employed is plain, the courts should accord to it the meaning which obviously would be accepted by the layman.' "

Article XV, section 9, Constitution of Nebraska, obviously was intended to be an exception to Article II of the Constitution. The language of the amendment, "Laws may be enacted providing for the investigation, submission and determination of controversies," coupled with the designation "An Industrial Commission," indicates a commission with administrative powers. The last sentence providing for appeals from its *final orders* and *judgments* means a commission with some judicial powers to determine controversies. The report of the joint committee that it was authorizing a commission with combined administrative, legislative, and judicial powers clearly indicates the type of commission or agency the Constitutional Convention was authorizing. In this respect, it is in the same category as Article IV, section 20, which created the Railway Commission. We have heretofore held that the Railway Commission has legislative, executive, and judicial powers as an exception to Article II. See, In re Lincoln Traction Co. (1919), 103 Neb. 229, 171 N. W. 192; Swanson v. Sorensen (1967), 181 Neb. 312, 148 N. W. 2d 197. The same is true with the Court of Industrial Relations. In adopting the constitutional provision authorizing an Industrial Commission, it was made an independent part of the

Constitution of Nebraska, and not as an amendment to Article II.

Article VII, section 14, Constitution of Nebraska, establishes a State Department of Education, and gives it general supervision and administration of the school system of the state. Section 15 of the same Article, however, provides that the State Board of Education shall be composed of eight members, and provides that their duties and powers shall be prescribed by the Legislature. The general supervision and administration of the school system of the state granted to the State Board of Education, while a constitutional grant of power, is dependent upon implementing legislative action. School Dist. No. 8 v. State Board of Education (1964), 176 Neb. 722, 127 N. W. 2d 458. In State ex rel. School Dist. v. Board of Equalization (1958), 166 Neb. 785, 90 N. W. 2d 421, which involved a Class III school district, as does the instant case, we said: "A school district in this state is a creature of statute and possesses no other powers than those granted by the Legislature."

In Campbell v. Area Vocational Technical School No. 2 (1968), 183 Neb. 318, 159 N. W. 2d 817, we said: "A school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty placed upon the Legislature 'to encourage schools and the means of instruction' * * *."

The Legislature has plenary power and control over school districts, including provision for the appointment or election of governing bodies thereof. Consequently, it may provide limitations on any authority to be exercised by a school board. If the Legislature has such complete control over public school districts, it follows, by the enactment of L. B. 15, Laws 1969, chapter 407, page 1405, it was exercising that control.

Upon application of the plaintiff, the court ordered the school district to conduct negotiations. This presents a two-pronged question. First, does the court have the power to order the district to negotiate about

anything; and second, does it have the power to order negotiations about professional associations, noon duty, dress code, and school calendar?

Section 48-837, R. S. Supp., 1969, provides: "Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing. Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder; Provided, that any such agreements with the State of Nebraska or any agency thereof shall cover a biennial period coinciding with the biennial budgeting period of the state and shall be subject to approval by the Legislature."

Section 48-810, R. S. Supp., 1969, provides: "All industrial disputes involving governmental service, service of a public utility, or other disputes as the Legislature may provide shall be settled by invoking the jurisdiction of the Court of Industrial Relations; Provided, such court shall have no jurisdiction over any persons, organizations, or school districts subject to the provisions of the Nebraska Teachers' Professional Negotiations Act, sections 79-1287 to 79-1295, Revised Statutes Supplement, 1967, until all provisions of such act have been exhausted without resolution of the dispute involved."

Section 48-810.01, R. R. S. 1943, provides: "Notwithstanding any other provision of law, the State of Nebraska and any political or governmental subdivision thereof cannot be compelled to enter into any contract or agreement, written or otherwise, with any labor organization concerning grievances, labor disputes, rates of pay, hours of employment or conditions of work."

Section 48-818, R. S. Supp., 1969, provides: "The findings and order or orders may establish or alter the

scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees. Any order or orders entered may be modified on the court's own motion or on application by any of the parties affected, but only upon a showing of a change in the conditions from those prevailing at the time the original order was entered."

In International Brotherhood of Electrical Workers v. City of Hastings (1965), 179 Neb. 455, 138 N. W. 2d 822, we held that a public agency or governmental employer had no legal authority to bargain with a labor union in the absence of express statutory authority, and further that the Court of Industrial Relations had no power to compel a public utility operated by government in its proprietary capacity to bargain or negotiate with a labor union. Subsequent to this case, in 1967, the law was amended to give the court authority to order bargaining when the public corporation was acting in a proprietary capacity, as defined in section 48-801, R. R. S. 1943. L. B. 15 amended section 48-816, R. R. S. 1943, to eliminate "when acting in a proprietary capacity as defined in section 48-801" from the statute, but left the provision permitting the court to order bargaining unchanged, although several other additions were

made to section 48-816, R. R. S. 1943.

L. B. 15 amended sections 48-801, 48-804, 48-810, 48-811, 48-816, and 48-818, and repealed sections 48-810.02, 48-820, and 48-824 to 48-836, R. R. S. 1943. It did not repeal or amend section 48-810.01, R. R. S. 1943, which came into the law in 1967. The question for our consideration, therefore, is whether or not there is a conflict between section 48-810.01, R. R. S. 1943, and section 48-818, R. S. Supp., 1969. Section 48-810.02, R. R. S. 1943, provided that in cities having a population of more than 5,000, or in cities under civil service, the court had jurisdiction to order discussion on the application of either party. Section 48-820, R. R. S. 1943, provided that any industrial dispute not within the jurisdiction of the court could by mutual consent be referred to the court for arbitration. Sections 48-824 to 48-836, R. R. S. 1943, covered arbitration for cities of more than 5,000, or a city under civil service, but any decision or report would be advisory only. It is obvious that by eliminating these sections, the Legislature intended to eliminate advisory arbitration reports, and by L. B. 15 attempted to give the court authority to order bargaining.

Section 48-810, R. S. Supp., 1969, provides that all industrial disputes involving governmental service *shall be settled* by invoking the jurisdiction of the Court of Industrial Relations, but limits the jurisdiction of the court where sections 79-1287 to 79-1295, R. S. Supp., 1967, are involved, *until* those provisions have been exhausted *without a settlement of the dispute.* It may be argued that section 48-810.01, R. R. S. 1943, was inadvertently left in the law. We do not accept this premise, but assume the Legislature acted with full knowledge that it was leaving this section in the statute. Consequently, the section must be given some meaning in relation to the other sections, because all statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to

each provision. City of Grand Island v. Ehlers (1966), 180 Neb. 331, 142 N. W. 2d 770. The court construed section 48-810.01, R. R. S. 1943, to mean that while the court could not order a school district to enter into a contract, the court had the power to settle any controversy pursuant to sections 48-816 and 48-818, R. S. Supp., 1969. In doing so, it was not forcing the district to enter into a contract with the union but was exercising its power to settle a dispute under section 48-818, R. S. Supp., 1969. There is no other construction which would harmonize the sections.

Defendant's position is indicated by the following from its brief: "Whatever jurisdiction the Court of Industrial Relations may have, this much is certain that notwithstanding any other provision of law the School District cannot be compelled to enter into any contract or agreement with any labor organization concerning rates of pay. The Court's judgment is in direct violation of this statute." This, of course, is premised on its interpretation of section 48-810.01, R. R. S. 1943. We have indicated our interpretation.

There have been many dire predictions relative to the possible ramifications of L.B. 15 if we do not find section 48-810.01, R. R. S. 1943, specifically prevents the court from entering a binding order on wages and conditions of employment. As we interpret the Constitution, the Legislature has complete control of the actions of school boards. Whether or not the Legislature has acted wisely in the premises is not a matter for judicial determination. The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. If the situation is as critical as defendant and the amici curiae believe, we can only observe, as we did in State v. Workman (1971), 186 Neb. 467, 183 N. W. 2d 911: "* * * defendant is making his contentions in the wrong forum. They might appropriately be addressed to the Nebraska Legislature, but it is the duty of this court

to interpret and enforce laws passed by the Legislature if constitutionally valid, which this one is."

The next question raised involved an interpretation of the language "conditions of employment." While the issue may be moot because the parties did reach agreement on all points referred except wages we do feel some observations are pertinent. Generally, teacher organizations have given the term "conditions of employment" an extremely broad meaning, while boards of education have tried to restrict that term to preserve their management prerogatives and policy-making powers. While there are many nebulous areas that may overlap working conditions, boards should not be required to enter negotiations on matters which are predominately matters of educational policy, management prerogatives, or statutory duties of the board of education. Kansas, by statute, has defined conditions of employment to include hours of work, vacation allowances, sick and injury leave, number of holidays, and wearing apparel. K.S.A. 1971 Supp., § 75-4322(s). Without trying to lay down any specific rule, we would hold that conditions of employment can be interpreted to include only those matters directly affecting the teacher's welfare. Without attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed. The public policy involved in this legislation is expressed in section 48-802, R. R. S. 1943. With this public policy in mind, school districts and teacher associations should negotiate in good faith within the ambit of their respective responsibilities.

One of the amici curiae raised the point that the court had not complied with the Administrative Pro-

cedures Act. The point was not raised by defendant, and there is nothing in the record to indicate noncompliance with the Act. Because the question may be raised in the future, we hold the Court of Industrial Relations is an agency within the purview of the Administrative Procedures Act.

The Court of Industrial Relations does not come within the definition of a court as used in section 84-901, R. R. S. 1943, nor has it been specifically excepted from the operation of the Act. In this respect, it is in the same situation as the Nebraska Railway Commission. In Yellow Cab Co. v. Nebraska State Railway Commission (1963), 175 Neb. 150, 120 N. W. 2d 922, we held the railway commission to be an agency within the definition in section 84-901, R. R. S. 1943. That section provides, so far as material herein: "Agency means each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules, except the Adjutant General's office, as provided in Chapter 55, the courts, including the Nebraska Workmen's Compensation Court, and the Legislature; * * *." Section 48-809, R. R. S 1943, grants the court full power to adopt all reasonable rules and regulations.

The following from Yellow Cab Co. v. Nebraska State Railway Commission, *supra*, is pertinent herein: "The fact that the commission has certain legislative and judicial powers which may distinguish it in certain respects from other agencies which exercise purely administrative powers does not prevent it from being an agency of the state in a broad sense."

For the reasons enunciated, the judgment of the court is correct and is affirmed.

AFFIRMED.

NEWTON, J., dissenting.

I find that I cannot agree with the majority opinion adopted as the law of this case. For a great many years the states have opposed and decried the steady and

seemingly inexorable growth of federalism and the centralization of governmental powers in the national capitol. This decision and the legislative act on which it is based is a step toward the creation of similar centralized powers in the Nebraska State Capitol on a statewide basis. It deprives local political subdivisions of the right to manage their own affairs in regard to employment practices. The law of supply and demand is nullified as is also ability to pay. It is replaced by the arbitrary decisions of a Commission operating on a statewide level. Since the wages of employees constitute a very major item in the budgets of all political subdivisions, the decisions of the Commission necessarily interfere with and, to some extent, govern the governmental duties of making budgets, appropriations, and ascertaining the levels of taxation. Although our political subdivisions are, at least for the most part, restricted in authority to powers granted by the Legislature, the theory of local self-government is recognized by our constitutional provisions relating to counties and cities. As was aptly stated in Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179: "Local self-government, having always been a part of the American system, finds recognition in the provisions of our State Constitution; and even if not expressly recognized, it is still to be understood that these instruments are framed with its present existence and anticipated continuance in view."

The powers conferred by Chapter 48, article 8, R. R. S. 1943, on the Industrial Commission are very broad. If construed as applicable to the State and its political subdivisions, they necessarily conflict with existing statutes, theories of government, and constitutional provisions. Tax levies of certain municipalities, school districts, townships, and other governmental subdivisions are limited by legislative enactment and, in the case of counties, by the Constitution. The power to make appropriations and to levy taxes has been vested in the local governing bodies. There are penalties assessable

for violations such as excess levies or spending unbudgeted and unappropriated funds. Furthermore, tax levies and appropriations are made on an annual basis and are not thereafter subject to change. Can the Commission, under the guise of settling a labor dispute regarding wages or other expense items, direct the governing bodies of these organizations to expend additional funds and, in so doing, violate statutory or constitutional provisions expressly passed or adopted for their government? Can it take over the powers of taxation and appropriation specifically granted these political subdivisions by the Constitution and statutes? This situation would indicate that Article XV, section 9, Constitution of Nebraska, did not contemplate placing public bodies under the Commission's jurisdiction. Furthermore, *not a single one* of the statutes governing these political subdivisions in the manner mentioned has been amended to make the taxation and appropriation authorities subject to tinkering by the Commission. In this respect there has been a violation of Article III, section 14, of the State Constitution.

Also of interest is a situation which could develop on the state level. Nebraska has the standard republican form of government with its basic three-way division of powers. The most fundamental of all constitutional powers awarded to the legislative branch is the exclusive power to appropriate funds and levy taxes. This is a power which it cannot delegate. See, 16 C. J. S., Constitutional Law, § 133, p. 552; Opinion of the Justices, 54 Del. 366, 177 A. 2d 205; Crane v. Frohmiller, 45 Ariz. 490, 45 P. 2d 955; Blaine County Inv. Co. v. Gallet, 35 Idaho 102, 204 P. 1066; El Dorado Independent School Dist. v. Tisdale (Tex. Com. App.), 3 S. W. 2d 420; Opinion of the Justices, 244 Ala. 386, 13 So. 2d 674; Cook v. Up-to-Date Silk Yarn Dyeing Co., 155 Misc. 435, 278 N. Y. Supp. 348.

What then is the effect in an instance where the Legislature has appropriated a sum to recompense state

employees and provided for raising this money by taxation, then in a dispute over wages, the Industrial Commission raises wages? Any excess over the legislative appropriation cannot be paid under constitutional provisions and the attempt to delegate power to the Commission to settle the dispute by raising wages is an attempt to delegate power to the Commission to make a state appropriation. As such it is void and unconstitutional. "It is just as fundamental that the power to tax and the power to provide for the disposition of taxes raised are identical and inseparable, and the Legislature is clothed with full power and control over the disposition of revenues derived from taxation, including those raised by political subdivisions of the state under authority of the state, subject only to constitutional restrictions. * * *

"It should also be construed when the meaning is not clear to conform with fundamental principles of taxation in the levy and collection of taxes and in the apportionment and distribution thereof unless a contrary intent is indicated by its terms. The fundamental principle that the powers of the Legislature on matters of taxation are plenary except where clearly restricted by the Constitution, must also be considered. The powers of the Legislature on matters of taxation cannot be limited by implication or interpretation, and the restriction upon the legislative power must be clear and unequivocal. The construction given the constitutional provision by the Legislature and by administrative officers since its enactment must likewise be given the effect to which it is entitled." State ex rel. School Dist. of Scottsbluff v. Ellis, 168 Neb. 166, 95 N. W. 2d 538.

The act creating the Commission purports to derive its authorization from Article XV, section 9, Constitution of Nebraska. The language of that section and the powers it intended to confer are not clear. Was it intended to apply to the State and its governmental sub-

divisions? I submit that the foregoing indicates it was not.

Article XV, section 9, Constitution of Nebraska, provides: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees *in any business or vocation affected with a public interest*, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commisison may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission." (Emphasis supplied.)

The scope covered is limited to "any business or vocation *affected with a public interest.*" Just what businesses can the Legislature authorize the Industrial Commission to deal with? It will be noted that this section uses the words *"any business or vocation."* What is the common and accepted meaning of these words? A business is "a commercial or industrial enterprise." A vocation is "the work in which a person is regularly employed." Webster's Third New International Dictionary, p. 2561. The terms refer to occupations, activities, and enterprises for gain, advantage, or livelihood. See Black's Law Dictionary (De Luxe, 4th Ed.), p. 248. No governmental unit, whether it be the state or a subdivision, can be classified as a business or vocation. They are only governmental agencies supplying governmental services on a nonprofit basis. As such, the powers conferred in Article XV, section 9, Constitution of Nebraska, are clearly inapplicable to them. Employment by the State, for example, is not a vocation. Vocation means type of employment such as stenographer, accountant, secretary, laborer, etc. In adopting Chapter 48, article 8, R. R. S. 1943, as amended, the Legislature has exceeded its constitutional powers in its attempt to bring governmental agencies within the ambit

of the act and the act is unconstitutional. "The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense." State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N. W. 2d 122. See, also, State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1.

What is meant by the term "affected with a public interest"? It is a fundamental principle of constitutional construction that effect must be given to the intent of the framers of the organic law and of the people adopting it. See 16 Am. Jur. 2d, Constitutional Law, § 64, p. 239. In State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502, it is held: "The meaning of a constitutional provision is to be determined as of the time of its adoption, and the intent and understanding of its framers and the people who adopted it is the principal inquiry in construing it." In Ramsey v. County of Gage, 153 Neb. 24, 43 N. W. 2d 593, it is stated: "* * * this court will take judicial notice of the proceedings of the Constitutional Convention." The decision of the court is embodied in the following statement: "It is quite apparent from an examination of the Proceedings of the Constitutional Convention with reference to the subject matter here involved that the people did not only change the language of the provision of the Constitution in question but the construction as well." See, also, Swanson v. State, 132 Neb. 82, 271 N. W. 264.

The constitutional provision in question was adopted pursuant to the Constitutional Convention of 1919-1920. An examination of the Convention proceedings and of the statement made by the drafter of the provision make it crystal clear that it was not intended to bear upon or affect governmental units. The amendment was denominated "Proposal No. 333." As originally introduced, it provided in part as follows: "Section 1. Laws

may be enacted providing for the investigation, submission and determination of controversies between employers and employees in which the *public welfare* is affected; providing against unfair business practices and unconscionable gains in any business or vocation affected with a public interest; and the interest of the public may be protected by law against interruption, *either in the public service, in the operation of public utilities or in the production and distribution of commodities essential to the public welfare.*" (Emphasis supplied.) Note it specifically included *public service,* as well as public utilities, and commodities essential to the public welfare. Considerable discussion ensued resulting in its amendment as finally adopted. At that time the delegate offering the amended version defined the term "affected with a public interest." He distinguished it from the general welfare and then stated: "Business, as I understand it, affected by a public interest is business in which the public surrenders to some person, firm, association or corporation, some right in which the public gives to some individual or corporation, some privilege which it might not otherwise have the right to enjoy. If the Convention will permit me I will read from as good an authority as we have upon definitions, Bouvier's Law Dictionary:

" 'PUBLIC INTEREST. If by public permission one is making use of public property and he chances to be the only one with whom the public can deal with respect to the use of that property, his business is affected with a public interest which requires him to deal with the public on reasonable terms.' That is quotation from Cooley on Constitutional Limitations.

" 'Business affected with a public interest:

" '1. Where the business is one, the following of which is not of right, but is permitted by the state as a privilege or franchise. 2. Where the state on public grounds renders to the business a special assistance by taxation or otherwise. 3. Where for the accommo-

dation of a business special use is allowed to be made of public property or of a public easement. 4. Where the special privileges are granted in consideration of some special return to be made to the public.'

"In other words business that is affected by a public interest is business for which the public as a whole, which society because of some person or corporation and special right, privilege or franchise, and in consideration of the granting of that right of franchise the public interest is affected and the conduct of such corporation or person may be regulated by law."

It is clear that the term "business or vocation affected with a public interest" was used in its narrow legal sense and that this usage was understood by the delegates. The original reference to "public service" which might be interpreted as extending to governmental services was deleted, presumably for good reason. The businesses referred to include *only* private businesses.

"Respecting regulation consistently with due process, businesses 'affected with public interest' are merely those subject to exercise of police power. Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., Cal., 82 P. 2d 3, 14, 118 A. L. R. 486.

"A business is 'affected with a public interest' when by law or legal authority it is given a virtual monopoly in its field or where the public adapt their business or conduct to the methods used by it. Western Buse Telephone Co. v. Northwestern Bell Telephone Co., 248 N. W. 220, 229, 188 Minn. 524. * * *

"Constitutional provisions requiring 'due process of law' and 'equal protection of the laws' do not preclude a state Legislature from regulating a business 'affected with a public interest,' which means subject to the 'police power,' where regulation is not unreasonable, arbitrary, capricious, or discriminatory, and means are related to object of regulation. Bohannon v. Duncan, 196 S. E. 897, 898, 185 Ga. 840. * * *

"A business is 'affected with a public interest,' where the one engaged in it is acting under a franchise, or has a virtual monopoly in it, or where from the nature of the business the one carrying it on is necessarily intrusted with the property or money of his customers, or where the business has been conducted in such manner that the public have adapted their business to the methods used; but the fact that a license is required does not make the business a public employment. People v. Steele, 83 N. E. 236, 238, 231 Ill. 340, 14 L. R. A., N. S., 361, 121 Am. St. Rep. 321; City of Chicago v. Powers, 83 N. E. 240, 231 Ill. 560.

"The phrase 'affected with a public interest' can mean no more than that an industry, for adequate reason, is subject to control for the public good, and there is no closed class or category of such businesses affected with a public interest. Respecting regulation consistently with due process, businesses 'affected with public interest' are merely those subject to exercise of police power; touchstone of public interest not being enjoyment of any franchise or monopoly. Nebbia v. People of State of New York, N. Y., 54 S. Ct. 505, 291 U. S. 502, 78 L. Ed. 940, 89 A. L. R. 1469." 5A Words and Phrases, Business Affected, pp. 675, 676.

Public or governmental business has never been a subject of the police power. Such an exercise of power is unnecessary because this type of business is subject to direct legislative control at all times and in all respects without resort to the extraordinary remedy provided by the police power. It seems clear that Article XV, section 9, does not authorize legislation bringing political subdivisions or governmental agencies within the jurisdiction of the Industrial Commission. I conclude that insofar as present statutes attempt to delegate such power, they are unconstitutional and void.

In passing it may be well to note that Article XV, section 9, was adopted as a result of similar activity in the State of Kansas, yet in defining businesses "affected

with a public interest," the Kansas statute omits governmental units. See Kansas Statutes Annotated, section 44-603.

Another fundamental rule is that every statement in a state constitution must be interpreted in the light of the entire document, rather than as a sequestered pronouncement and because fundamental constitutional principles are of equal dignity and none must be so enforced as to substantially impair the other, if there is an apparent repugnancy between different provisions, the court should harmonize them if possible. See 16 Am. Jur. 2d, Constitutional Law, § 66, p. 243. In State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1, it is said: "The language of the Constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption. * * *

"The Constitution must be read in connection with the facts of history and the development of a representative form of government. * * *

"The Constitution as amended must be construed as a whole." See, also, Swanson v. State, 132 Neb. 82, 271 N. W. 264.

If Article XV, section 9, is limited in its application to public service companies and other private or corporate businesses which bear directly and materially on the public welfare and are therefore "affected with a public interest," there will be no conflict with other constitutional provisions, but if it is not, there is an obvious conflict. As heretofore pointed out, on the state level, the Legislature, and the Legislature only, can control the appropriation of money and the taxes to be levied. See Article III, sections 22 and 25, Constitution of Nebraska. Even the Legislature cannot incur indebtedness in excess of $100,000. See Article XIII, section 1. The division of governmental powers is provided for in the following language: "The powers of the government of this state are divided into three

distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Article II, section 1, Constitution of Nebraska. No direct constitutional provision authorizes such an encroachment by the executive or judicial departments upon the budgetary and appropriative powers of the Legislature.

There is also, as has been pointed out, a conflict with Article VIII, section 5, which places a limit on the amount of taxes which counties may assess or levy. Counties are presently hard pressed to finance their customary duties. To permit a foreign body to impose additional financial burdens by means of increased wages and salaries on a county which is already levying the maximum tax allowed will compel an excess levy or will simply require the abandonment or curtailment of county services rendered in connection with the maintenance of roads and bridges, the administration of social welfare, and of the numerous activities engaged in by various county officers. In the latter case, they will be unable to fulfill the duties imposed upon them by law.

From a practical standpoint, the Commission, by following guidelines it might see fit to adopt, can bring about a statewide wage scale for school district employees with a complete disregard for individual fitness and irrespective of the size and ability to pay of the respective districts. In so doing it can bring about the demise of many school districts and may well impair the operation of Article VII, section 6, which requires the Legislature to provide for free instruction in the common schools. In attempting to interfere with school curriculums, teachers' duties and hours, and local conditions under which teachers are employed and work, it will also clash with Article VII, section 14, which gives to the State Department of Education the general

supervision and administration of our school system.

The conflict with other constitutional provisions indicates two things. First, that Article XV, section 9, was never intended to be so broadly construed. Second, that in construing it in the light of the Constitution as a whole, it cannot be interpreted as a grant of authority over the State and its political subdivisions if it is to be reconciled with other constitutional directives.

I submit that Chapter 48, article 8, R. R. S. 1943, as amended, is unconstitutional and void.

WHITE, C. J., joins in this dissent.

CLINTON, J., dissenting.

I respectfully dissent. The majority opinion points out, correctly I believe, that Article XV, section 9, of the Constitution of Nebraska, authorizes the creation of the commission with commingled administrative, executive, and judicial powers. The opinion also points out that this is an independent grant of such power by virtue of the special provisions of Article XV, section 9, and is a constitutional exception to the separation of powers provision of Article II. I agree with this reasoning insofar as it applies to the scope of the matters entrusted to the commission by Article XV, section 9.

The point raised by Judge Newton is not the specific constitutional question raised by the defendant, but I believe it is in part valid. With him I believe Article XV, section 9, does not by its terms apply to employers and employees in the governmental sector. I base this conclusion upon the language of section 9 as adopted and without reference to the language eliminated from the original proposal in the course of this consideration. Section 9 grants power in two areas: (1) In determining controversies between employers and employees "in business or vocations affected with a public interest," and (2) the prevention of "*unfair business practices and unconscionable gains* in any business or vocation affecting the public welfare." (Emphasis supplied.)

It seems apparent to me that the terms "business or vocation" as twice used in Article XV, section 9, refers to profit-making businesses and vocations for the term "unfair business practices and unconscionable gains" can have no reference to the operation of state or governmental subdivisions in their governmental capacities. As first used, those terms refer to the employer's business or vocation and not to the occupation or vocation of the employee, for example, teachers. It is not reasonable to assume that in the first instance government is included in the term "business or vocation" and in the second instance it is not.

Because the statute in question grants a combination of executive, legislative, and judicial powers outside the scope of the matters authorized by Article XV, section 9, it runs afoul of Article II of the constitutional provision pertaining to the separation of powers.

There would, however, seem to be no question that the Legislature may enact independently of Article XV, section 9, labor legislation applicable to public employees, but in so doing the provisions of Article II on the separation of powers must be observed.

BOSLAUGH, J., concurring.

The question concerning the construction of Article XV, section 9, Constitution of Nebraska, raised in the dissenting opinion of Judge Newton, is not without force although not presented in any of the briefs filed in this case.

The section permits the enactment of laws relating to "controversies between employers and employees in any business or vocation affected with a public interest." Although there can be disagreement as to what this language means, it would appear that the terms business *or* vocation were used in an alternative sense and that legislation relating to controversies between employers and employees under this section is not limited to a business affected with a public interest.

The legislative construction of a constitutional pro-

vision, although not controlling, should be given consideration, particularly in doubtful cases and when deliberately made.

McCOWN, J., joins in this concurrence.

WESLEY F. HANSEN, APPELLEE, V. COUNTY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS.
197 N. W. 2d 655

Filed July 21, 1972. No. 38355.

SUPPLEMENTAL OPINION

Appeal from the district court for Lincoln County: HUGH STUART, Judge. On motion for rehearing. See *ante* p. 461, 197 N. W. 2d 651, for original opinion. Motion for rehearing overruled. Affirmed in part, and in part reversed and remanded.

W. R. Mullikin and Richard P. Myers, for appellants.

McGrath, North, Nelson, Shkolnick & Dwyer and August Ross, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Motion for rehearing in this case cites Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489, and suggests that while section 77-1736.04, R. R. S. 1943, provides the exclusive remedy to obtain a refund of taxes paid prior to a court decree enjoining collection or requiring segregation and accounting, yet as to taxes paid after the entry of decree the court may order refund as to the class of taxpayer who has paid after the entry of the decree. We have seriously examined this contention and find we cannot agree. Gamboni was decided December 10, 1954. Section 77-1736.04, R. R. S. 1943, Laws 1955, chapter 298, page 933, was enacted and

became effective June 15, 1955. It replaces and makes unnecessary that part of the relief afforded by Gamboni insofar as that case provides and approves a class action for refund of taxes. Under section 77-1736.04, R. R. S. 1943. where a court declares the invalidity of a tax, a taxpayer who has paid the tax is entitled to a refund automatically if the tax has not been distributed, and if it has, he is entitled to refund upon the filing and approval of a claim therefor. Insofar as Gamboni approves a class action for a refund of taxes it is disapproved. See State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N. W. 2d 5.

With this amendment we adhere to our previous opinion and the motion for rehearing is overruled.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

LADISLAV J. NEMECEK, APPELLANT, V. GAYLE ANN NEMECEK, APPELLEE.
199 N. W. 2d 409

Filed July 21, 1972. No. 38445.

Divorce: Parent and Child. In determining child custody, the paramount consideration is the best interests and welfare of the children.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed as modified.

Paul E. Watts, Michael N. Schirber, and Stephen Greenberg, for appellant.

J. William Gallup, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an appeal in a divorce action brought by Ladis-

lav J. Nemecek against Gayle Ann Nemecek. The amended petition alleged that the defendant had been guilty of extreme cruelty and adultery. These allegations were denied in the defendant's answer and cross-petition which alleged that the plaintiff had been guilty of extreme cruelty.

The trial court found the defendant had been guilty of extreme cruelty but the evidence was insufficient to sustain the allegations of adultery; the plaintiff should be granted a divorce from the defendant; and the defendant was a fit and proper person to have the custody of the minor children. It awarded child support in the amount of $80 per month per child until the children became self-supporting or emancipated. The plaintiff appeals.

The principal controversy is over custody of the minor children. The plaintiff contends the evidence established the defendant was guilty of adultery and that the custody of the children should have been awarded to him. The children involved are Lad Thomas, born December 18, 1961; Craig John, born November 17, 1963; and Brian Christopher, born November 2, 1965.

The parties were married in 1961. The evidence shows a course of misconduct by the defendant during the last 6 years of the marriage. This included visiting the apartments of other men in the early morning hours. Although circumstantial, there was evidence which, if believed, was clearly sufficient to establish adultery on the part of the defendant.

In determining child custody, the paramount consideration is the best interests and welfare of the children. Phillips v. Phillips, *ante* p. 89, 195 N. W. 2d 160. In this regard there is evidence in the record concerning the conduct of the plaintiff which makes it doubtful whether the custody of the minor children should be awarded to him.

The evidence relating to the care of the children by the defendant shows they have not been neglected or

mistreated in any way. Under these circumstances the judgment of the district court placing the children in the care of the defendant should not be reversed. However, in view of the evidence as to defendant's past misconduct, the judgment should be modified to provide for supervision of their custody by the chief juvenile probation officer. See Beck v. Beck, 175 Neb. 108, 120 N. W. 2d 585. As so modified, the judgment is affirmed. Defendant's attorney is allowed a fee of $250 for services in this court.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I respectfully dissent herein on the grounds that the divorce and the custody of the children should have been granted to the plaintiff because of the adulterous conduct of the defendant.

SMITH, J., dissenting.

The majority opinion comes to this: No major variable, except the judgment of the trial court, is significant.

The three sons of the parties were not represented by counsel. No rule of this court even authorized appointment of counsel for them. The Legislature ameliorated this abomination in our adversary system in 1972 —too late for the trial court to act. See Laws 1972, L.B. 820, § 12, p. 249.

Given the insignificance of all but one major variable and the absence of a truly adversary proceeding, I consider expert forensic opinions outside the record. Behavioral scientists have tentatively concluded that an award like the one before us increases the danger of harm to the personality of the boy. See, Burton and Whiting, "The Absent Father and Cross-Sex Identity," Studies in Adolescence 107 (R. Grinder Ed., 1965); Lynn and Sawrey, "The Effects of Father-Absence on Norwegian Boys and Girls," 59 J. Abnormal Soc. Psych. 256 (1959); Wylie and Delgado, "A Pattern of Mother-Son Relationship Involving the Absence of the Father,"

29 Am. J. Orothopsychiatry 644 (1959). See, also, Bradbrook, "The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes," 11 J. Fam. L. 557 at 563, 575, and 580-87 (1972); Kleinfield, "The Balance of Power Among Infants, their Parents and the State," 4 A. B. A., Fam. L. Q. 320 at 330 and 335-36 (1970).

I would award custody of the boys in this suit to their father.

NEWTON, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. MARCILYN C. WILLIAMS, APPELLANT.
199 N. W. 2d 611

Filed July 21, 1972. No. 38594.

1. **Statutes.** All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
2. **Post Conviction: Jurisdiction: Appeal and Error.** An appeal of a post conviction proceeding from a court inferior in jurisdiction to the district court may only be taken to the district court.

Appeal from the municipal court of Omaha. JOHN E. CLARK, Judge. Appeal dismissed.

Terrence J. Ferguson, Vard R. Johnson, Robert V. Broom, and Charles I. Scudder, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant was convicted on misdemeanor charges in the municipal court of the city of Omaha pursuant to

her pleas of guilty. She subsequently commenced a proceeding under the Post Conviction Act in the municipal court alleging a violation of her constitutional rights. She now seeks to appeal directly to this, the Supreme Court.

The sole question presently at issue is whether such a direct appeal can be taken from a municipal court. The Post Conviction Act was adopted in 1965. At that time there was considerable concern regarding violations of the constitutional rights of defendants in felony cases which were and are not cognizable in the municipal or other inferior courts. The constitutional rights theories then applicable in felony cases were not applicable in misdemeanor cases but have since been made so by decisions of the United States Supreme Court. As a consequence of this situation, the Act is ambiguous with reference to the question of appeal.

The Act requires a post conviction proceeding to be brought in the sentencing court, provides for appointment of defense attorneys by the district court, and states that an appeal may be taken to the Supreme Court. See §§ 29-3001 to 29-3004, R. S. Supp., 1969. Defendant contends the legislative intention was to permit appeals directly from the municipal court to the Supreme Court. Such an interpretation would fly in the face of reality. As pointed out, the Act when adopted was considered applicable only in felony cases which were beyond the jurisdiction of courts inferior to the district court. It was not then contemplated that such proceedings would ever be entertained in the inferior courts and by no stretch of the imagination can it be said that the Legislature contemplated direct appeals from such courts to the Supreme Court.

Sections 26-1,104 and 25-1901, R. R. S. 1943, provide that appeals from municipal courts shall be taken to the district court. In view of the circumstances outlined above, we are not convinced that the appeal permitted under section 29-3002, R. S. Supp., 1969, should

be regarded as a special act excepting such appeals from the general appeal statutes. On the contrary, we hold that it must be construed in pari materia with the general statutes governing appeals from municipal courts. "* * * All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision." State ex rel. Retchless v. Cook, 181 Neb. 863, 152 N. W. 2d 23.

We conclude that an appeal under the Post Conviction Act may not be taken directly to the Supreme Court from any court inferior to the district court and that this appeal must be dismissed.

APPEAL DISMISSED.

SMITH, J., concurring.

The need for uniformity in appellate procedure excuses this waste of judicial manpower.

RANCHLAND AUTO, INC., A CORPORATION, APPELLEE, V. DONALD J. CLEVELAND, APPELLANT.
199 N. W. 2d 702

Filed July 28, 1972. No. 38172.

1. **Contracts: Parties: Intent.** The interpretation given a contract by parties themselves while engaged in performance of it is one of best indications of true intent of the contract, and ordinarily, such construction of the contract should be enforced.
2. **Contracts: Parties: Intent: Trial: Evidence.** In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party.
3. **Contracts: Damages.** The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions.

Kirby & Spittler, for appellant.

Cronin & Hannon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

Ranchland sold Cleveland a new 1969 Dodge Polara for $4,449.15, Ranchland agreeing to take $1,250 cash and Cleveland's 1968 Dodge Polara, if repaired to its previous condition from damage resulting from an accident. It was so repaired, with no dispute as to repair price or proper restoration to its previous condition. The dispute here arises because neither Ranchland nor Cleveland, after due notice from the artisan lien holder who performed the repair work, reclaimed the car for the repair bill of $1,006.64 and it was sold at foreclosure auction. In a jury trial, Ranchland recovered a judgment for $3,199.15. On appeal, we reverse the judgment and remand the cause with directions to enter a judgment for Ranchland for the amount of the repair bill in the sum of $1,006.64.

Cleveland assigns error in the failure of the trial court to instruct the jury as to the measure of damages. The transcript reveals a failure to instruct on this issue. It is the duty of the court, on its own motion, to instruct on all material issues raised by the pleadings and evidence. The jury should have been told the manner in which the damages sustained by the plaintiff are to be measured and arrived at. See, Numon v. Stevens, 162 Neb. 339, 76 N. W. 2d 232; Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245; 17A C. J. S., Contracts, § 641, p. 1290.

Under the law and the undisputed facts, Ranchland is entitled to judgment for the repair bill in the sum of $1,006.64 only. The written contract of sale, signed by the parties, consisted of figure notations on an invoice form, setting up the 1969 Polara price, the cash pay-

ment, and the trade-in allowance of the damaged 1968 Polara. There is no dispute as to these figures. This written memorandum contains no reference to the repair of the trade-in or any duties incident thereto. Parol evidence and the parties' conduct in performing the contract are therefore admissible to explain and show the true nature of the transaction. Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562; Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531; Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448; Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913; Cook v. Wilkie, 181 Neb. 596, 150 N. W. 2d 124.

On March 12, 1969, a few days after the contract or memorandum was signed, Cleveland came to the Ranchland office. He paid the $1,250, gave the title to the 1968 Polara to Ranchland, assigned it to Ranchland, brought his trailer hitch, and put his license plates on the 1969 Polara. Buzeyn, representing Ranchland throughout, gave the title of the 1969 Polara to Cleveland. The damaged Polara, to Buzeyn's knowledge, was in Fritz's Body Shop at that time. There was a misunderstanding as to Cleveland's collision insurance. Cleveland thought it covered the repair bill but it did not. Buzeyn was aware of this problem and insisted Cleveland straighten it out. Buzeyn visited the body shop, was aware of the progress of the repairs, and instructed the body shop to paint the Polara two-tone. He had the title, had received the cash, and listed and used the 1968 Polara as security for a loan with his bank. In the fall of 1970 Fritz's Body Shop, after demand and notice to both Ranchland and Cleveland, foreclosed its lien and sold the 1968 Polara.

From these undisputed facts it is clear from the conduct of the parties before any dispute arose, that Ranchland had ownership and the complete power and control over the title and possession of the 1968 Polara. It exercised dominion and control, directing the changes in the repair work, and using it for loan purposes. It

assumed all the normal incidents, duties, and responsibilities of ownership. It is true that Cleveland had a personal obligation and commitment to pay the repair bill. But, in the performance of the contract, when he assigned and delivered the title and placed the possessory control flowing from ownership in Buzeyn, and Buzeyn accepted the transfer with full knowledge of the facts, and affirmed the mutual transfer of ownership by delivery of title and possession of the new 1969 Polara, we must assume both parties accepted and assumed the normal benefits and risks of loss incident to such ownership. With knowledge of all the facts the parties themselves mutually transferred the title to the vehicles and by their conduct in partly performing their contract effectively modified and changed their original obligations to protect their respective properties from loss resulting from the normal incidents of ownership. Ranchland cannot create a lien for one purpose and at the same time deny its obligation to protect its own property from another lien that it knew existed. We therefore hold that Cleveland's liability is limited to his personal promissory obligation to pay the repair bill, the amount of which, $1,006.64, is not in dispute.

The measure of damages in the case of a breach of a promissory obligation under a contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of which it has entailed. Numon v. Stevens, *supra;* Gallagher v. Vogel, *supra.*

In the light of our decision on the undisputed facts, it is not necessary to discuss other issues presented. The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff in the sum of $1,006.64, each party to pay its own costs.

REVERSED AND REMANDED WITH DIRECTIONS.

NETTIE SACCO, APPELLANT, V. URBAN CORNELIUS GAU ET AL., APPELLEES.
199 N. W. 2d 605

Filed July 28, 1972. No. 38220.

1. **Trial: Evidence: Witnesses.** Ordinarily, a party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. This is especially so as to the circumstances of an accident or similar event, because in such a case the party's testimony is especially subject to inexactness of observation and memory.
2. ———: ———: ———. Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where the party so testifying made no effort to retract, qualify, or otherwise explain the positive force of his own evidence.
3. **Negligence: Motor Vehicles.** Violation of a stop light, standing alone, is not sufficient to prove gross negligence.
4. **Trial: Evidence.** The admission in rebuttal of testimony which should have been offered in chief rests in the sound discretion of the court.
5. **Trial: Instructions.** Instructions must be confined to issues supported by the evidence.
6. ———: ———. Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, that is sufficient.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Louis T. Carnazzo and Albert C. Walsh, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellees Gau et al.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee Scapellato.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

NEWTON, J.

This is an action for damages for personal injuries

sustained in an automobile accident. Plaintiff was a guest passenger in an automobile operated in a northerly direction by the defendant Rose Scapellato. The accident occurred at an intersection controlled by automatic, electrically operated traffic lights. The defendant Gau, acting within the course and scope of his employment by the defendant, Byers Transportation Company, was driving west. At the conclusion of plaintiff's evidence, the court dismissed the action as to the defendant Scapellato. At the conclusion of the trial, a verdict was returned and judgment entered for the remaining defendants. We affirm the judgment of the district court.

Plaintiff's evidence reflects the foregoing facts. In addition, it shows that the Scapellato car, driven at a reasonable rate of speed, approached the intersection, stopped for a red light, and then proceeded. The driver states she did not see the Gau car prior to the impact and her car was struck on the right side. Plaintiff also called defendant Gau who stated he entered the intersection at a speed not exceeding 20 miles per hour; he saw the Scapellato car when a short distance from the intersection; and the light was green for westbound traffic. On seeing the Scapellato car entering the intersection, he applied his brakes and left skid marks 20 feet in length. Her car was going about 20 miles per hour. The plaintiff testified that the Scapellato car stopped for a red light at the intersection and entered it when the light changed to green. She was going about 15 miles per hour at the time of the accident. A police officer stated that the Gau car left 31 feet of skid marks and was told by Gau he had been going 25 miles per hour. He also stated that defendant Scapellato said she was going 5 to 10 miles per hour.

On this state of the record, the court sustained the motion of the defendant Scapellato to dismiss the case as to her. The evidence is barren of any proof of negligence on the part of this defendant except for the

statement of the defendant Gau regarding right-of-way made in contradiction of all the other witnesses, including the plaintiff herself. In other words, the only evidence of negligence on the part of defendant Scapellato is the evidence of Gau to the effect that she ran a red light and this is denied by plaintiff's own testimony. Ordinarily "'* * * a party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. This is especially so as to the circumstances of an accident or similar event, because in such a case the party's testimony is especially subject to inexactness of observation and memory.'" Vermaas v. Heckel, 170 Neb. 321, 102 N. W. 2d 647.

On the other hand, this court has held that: "Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where the party so testifying made no effort to retract, qualify, or otherwise explain the positive force of his own evidence." Southwestern Truck Sales & Rental Co. v. Johnson, 165 Neb. 407, 85 N. W. 2d 705.

In the present instance, plaintiff's petition alleges that defendant Gau entered the intersection against a red light, but does not allege that defendant Scapellato negligently did so or violated any rule pertaining to right-of-way. Under these circumstances it appears plaintiff was not entitled to a submission of the question of gross negligence on the part of the defendant Scapellato and that the court was correct in dismissing the case as to this defendant. Furthermore, violation of a stop light, standing alone, is not sufficient to prove gross negligence. See, Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266; Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321, 29 A. L. R. 3d 236.

After plaintiff rested, the defendant Gau adduced evidence indicating that he had the right-of-way with a green light. Plaintiff then sought to introduce, by the testimony of other witnesses, evidence that Gau had entered the intersection against a red light. The court sustained an objection made on the ground that the evidence offered was improper rebuttal testimony. Plaintiff alleged this fact as one ground of negligence and evidence of it was part of her case-in-chief. The admission in rebuttal of testimony which should have been offered in chief rests in the sound discretion of the court. See, McClellan v. Hein, 56 Neb. 600, 77 N. W. 120; Hutchinson v. Western Bridge & Constr. Co., 97 Neb. 439, 150 N. W. 193; Mutz v. Sanderson, 94 Neb. 293, 143 N. W. 302.

The court, in its instructions, gave the following: "No person shall drive or operate a vehicle upon a street at a rate of speed greater than is reasonable and prudent, having due regard for the traffic, surface, width, and condition of the road, and the hazard at intersections." The jury was not instructed that plaintiff charged defendant Gau with negligence due to unreasonable speed. There is no contention that defendant Gau's speed was in violation of the speed limit, only that it was an "unreasonable and excessive rate of speed under the circumstances then existing of (25) miles per hour, whereby he forfeited any right of way he might otherwise have had." The allegation is in a manner of speaking double-barreled but appears to be aimed at the question of right-of-way rather than that of negligent speed. At the time of this accident, section 39-751, R. R. S. 1943, governing right-of-way at open or unprotected intersections provided that a driver traveling at an unlawful speed forfeited the right-of-way. That subsection of the statute has since been deleted. It was not applicable in the present case. There is no evidence of unlawful, excessive, or unreasonable speed on the part of defendant Gau. He was driving

at a normal rate of speed and had a right to assume, if he had the right-of-way, that other drivers would respect his right-of-way and not run a red light. If this occurred, by the time he became aware of that fact, it was too late for him to avoid the accident. Ordinarily issues regarding speed, lookout, and control are for determination by the jury. See Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N. W. 2d 329. One ground on which that case was reversed was the failure to submit a disputed question of unlawful speed to the jury. Evidence as to which motor vehicle had the right-of-way at the intersection controlled by automatic lights was also in conflict. There was evidence that one was traveling at a speed exceeding the speed limit and although the verdict favored this motorist, it was held that even if he had the right-of-way, he could be held negligent due to excessive speed. In this respect, that case differs from the present one.

Since the court submitted the question of right-of-way, it is evident that the jury in rendering a verdict for defendant Gau found that he had the right-of-way. There is no contention that he violated the speed limit or was driving at an abnormal rate of speed. The only remaining question in this regard pertains to whether or not his speed was negligent under the circumstances then existing. We do not believe that the mere fact an accident occurs is sufficient to find one negligent in this respect. Negligence is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances. See NJI No. 3.02.

Defendant Gau entered the intersection at a moderate rate of speed in response to a green light giving him the right-of-way as against crossing vehicles not already in the intersection. He was maintaining a reasonable

lookout, as evidenced by the fact he saw the Scapellato car before it entered the intersection, and he exercised reasonable control of his automobile by locking the brakes immediately on becoming aware of the fact that the Scapellato car had failed to stop and yield the right-of-way.

In view of the fact that Gau was entitled to assume that the Scapellato car would stop for the red light and could not reasonably have been expected to avoid the accident when it failed to do so, we cannot perceive wherein he was negligent. What did he do or fail to do that an ordinary, prudent motorist would or would not have done? The answer is nothing. He simply drove at a speed and under such circumstances as to lookout and control as were being followed by all other motorists using the same intersection. For similar cases see: Schultheis v. Levin, 372 Pa. 513, 94 A. 2d 740; Call Carl, Inc. v. Deadwyler (D. C.), 187 A. 2d 701; State v. Marvil Package Co., 202 Md. 592, 98 A. 2d 94; Sun Cab Co., Inc. v. Cusick, 209 Md. 354, 121 A. 2d 188; Robinson v. Ferguson, 105 Ohio App. 311, 149 N. E. 2d 152; Larson v. Evans, 12 Utah 2d 245, 364 P. 2d 1088; Texas-Arizona Motor Freight, Inc. v. Mayo, 70 Ariz. 323, 220 P. 2d 227; Wilson v. Overbey, 223 Ore. 256, 354 P. 2d 319; Loving v. Whitton, 241 N. C. 273, 84 S. E. 2d 919; Weil v. Longyear, 263 Mich. 22, 248 N. W. 536; McGuire v. Rabaut, 354 Mich. 230, 92 N. W. 2d 299.

His *speed* was not a proximate cause of the accident. The actual or proximate cause was that one or the other of the drivers concerned disobeyed the traffic signals. Instructions must be confined to issues supported by the evidence. See Lund v. Mangelson, 183 Neb. 99, 158 N. W. 2d 223.

Plaintiff's complaint of a failure to further instruct on speed and consequent forfeiture of right-of-way is without merit.

Plaintiff maintains that instructions on concurrent

negligence and defendant Gau's liability thereunder were inadequate. We cannot agree. Standard instructions defining proximate cause and result and concurring cause were given. See NJI Nos. 3.41 and 3.42.

In another instruction, the court set out the elements which plaintiff was required to prove and therein included the following: "That the negligence of Urban Cornelius Gau, if any, was the proximate cause of the accident; or that the negligence of the said Urban Cornelius Gau concurred or combined in any degree, if any, with the negligence of Rose Caniglia Scapellato, the driver of the car in which the plaintiff was riding as a passenger, and was a proximate cause of the collison. * * *

"If the plaintiff has established by a preponderance of the evidence all of the above-numbered propositions, then your verdict will be for the plaintiff and against the defendants in the amount of such damages."

The instructions appear to be clear and to adequately explain the elements of proximate cause and concurrent negligence. "Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, that is sufficient." Lucht v. American Propane Gas Co., 183 Neb. 583, 162 N. W. 2d 891.

Plaintiff also contends that the evidence is insufficient to sustain the verdict or a finding that defendant Gau entered the intersection with a green light. This assignment of error is without merit. The defendant Gau and two other witnesses, one driving behind the Gau car and the other behind the Scapellato car, testified unequivocally that Gau had the right-of-way. The evidence was sufficient so that a jury might well have found this to have been the case and to justify a verdict for the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD L. REED, APPELLANT.

199 N. W. 2d 707

Filed July 28, 1972. No. 38285.

Criminal Law: Searches and Seizures. An exception to the exclusionary rules of search and seizure is the rule of harmless error beyond a reasonable doubt.

Appeal from the district court for Douglas County: C. THOMAS WHITE, Judge. Affirmed.

David L. Herzog and J. Patrick Green, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury returned a verdict of guilty against Ronald L. Reed on these counts: (1) Entry into a bank with intent to take property of the bank by violence or intimidation; (2) use of a firearm in commission of a felony; and (3) shooting "at" William Tate with intent to kill, wound, or maim. § 28-410, R. S. Supp., 1969. Ronald appeals. He asserts a violation of the exclusionary rules of search and seizure and insufficiency of the evidence.

Three men respectively armed with a carbine, a shotgun, and two revolvers attempted to rob the Ames Plaza Bank in Omaha on October 20, 1970, at 8 p.m., closing time. One visitor and 13 bank employees were present.

William Tate, an Omaha police sergeant and a part-time guard at the bank, testified as follows: Ronald pushed a carbine against Tate's back, ordering him to lie on the floor. Tate turned, grabbed the barrel of the carbine with his left hand, and forced the muzzle downward between his knees before Ronald fired. At

the same time he drew and fired his .38 calibre service revolver toward Ronald, who stood 6 inches away. Tate looked at Ronald's midriff. He thought 2 bullets struck Ronald in the stomach, although he saw no sign of a wound.

The other intruders were attempting to shoot Tate. The latter, having emptied his revolver and crawling toward the rear of the bank to reload, suffered shotgun wounds. The assailants fled.

Another employee identified Ronald as the man with the revolvers. No one else in the group of 14 except Tate knew whether or not Ronald had been one of the assailants.

Irma Reed testified as follows: She and Ronald, her cousin, on October 7, 1970, rented a house at 4267 Wirt Street in Omaha. Ronald used the name "Duane Reed" in signing the lease. He, not Irma, occupied the house, but she visited him there several times the following week or two. Ronald visited her and other relatives at the home of Irma's mother in Omaha. She saw him in Omaha several days after October 20, and there were no signs of a stomach wound or nervousness. Absence of a stomach wound was conclusively established by testimony of a physician.

A plumber who had been called, was admitted to the house at 4267 Wirt Street on October 23, 1970. A holstered pistol hung from a doorknob. The plumber before departure noticed that the pistol and holster were no longer there.

Ronald was arrested at Minneapolis, Minnesota, the city of his residence, in an apartment where he was a guest. From clothing in the apartment an officer removed four items—identification, social security, and credit cards, and a Nebraska driver's license bearing the name "Dana W. Hudson." Seizure of the license led to discovery of latent fingerprints of Ronald on the license application, dated October 20, 1970, in Omaha. A motion by Ronald to suppress the items was over-

ruled, and they were received in evidence.

An exception to the exclusionary rules of search and seizure is the rule of harmless error beyond a reasonable doubt. See Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); Cannito v. Sigler, 449 F. 2d 542 (8th Cir., 1971).

It is possible that the alias "Dana W. Hudson" prejudiced Ronald. Defense counsel argues prejudice in that the date, place, and fingerprints on the license application proved the presence of Ronald in Omaha on October 20, 1970. We need not reach the ruling in question, for such error would have been harmless beyond a reasonable doubt.

The jury could properly find Ronald guilty beyond a reasonable doubt. See State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. WILLIAM E. PETERS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLEE.

199 N. W. 2d 738

Filed July 28, 1972. No. 38418.

1. **Attorney General: Powers: Taxation.** The Attorney General may on his own relation in the name of the State of Nebraska bring an action for a declaratory judgment challenging the constitutionality of a statute which the Tax Commissioner of the State proposes to implement by enforcement and regulation pursuant to the duties imposed upon that officer by statute and the Constitution.
2. **Attorney General: Powers.** The rule that a person may not attack the constitutionality of a statute where his rights are not thereby affected applies to private persons and not to the Attorney General who is acting in the public interest.
3. **Declaratory Judgments.** The Declaratory Judgments Act is remedial and is to be liberally construed and administered.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellant.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ., and RONIN, District Judge.

CLINTON, J.

This is an action for a declaratory judgment instituted in the name of the State of Nebraska by the Attorney General on the relation of the Attorney General himself against the Tax Commissioner, alleging the unconstitutionality of L.B. 945, 1971 Legislature. It prays for a determination of the unconstitutionality of the act in whole or in part and for a construction of such parts as may be valid. L.B. 945 amends various sections of the property tax laws, but the apparent main purposes of the act are the provisions for equalizing assessments and adjusting levies where a taxing district overlaps county lines. The petitioner alleges the statutory duties of the Tax Commissioner in connection with the administration of the revenue laws of the State and alleges that he will implement the act by regulation and enforcement unless the act or portions of the act are declared unconstitutional.

The Tax Commissioner entered an appearance and demurred to the petition on the following grounds: (1) The court has no jurisdiction of the subject matter of the relator's alleged cause of action. (2) The relator lacks legal capacity to maintain the action. (3) The amended petition of the relator does not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, the Attorney General elected to stand on his amended petition, and the court

dismissed the action. The Attorney General then perfected this appeal.

The principal issues argued here are the authority of the Attorney General to sue on his own relation and whether or not there exists a present controversy and justiciable issue within the meaning of the Declaratory Judgments Act. For reasons we hereafter set forth we determine these issues favorably to the Attorney General. We must, however, examine the issues of constitutionality (which are briefed only by the Attorney General), since if the act is in whole patently and clearly constitutional then no cause of action is stated. We determine that certain sections of the act are clearly unconstitutional, certain sections are clearly constitutional, and some are of doubtful constitutionality, concerning which the taking of evidence may be necessary. Accordingly we reverse the order of dismissal and remand the cause for trial.

This court long ago laid down the principles which we believe are determinative of the authority of the Attorney General to bring an action such as this. In the case of State ex rel. Sorensen v. State Board of Equalization & Assessment, 123 Neb. 259, 242 N. W. 609, the Attorney General was held to have authority to invoke the jurisdiction of this court by writ of error to the State Board of Equalization and Assessment. In that case the statute gave the right of appeal only to "any person, county, or municipality affected thereby." The court cited the early Nebraska case of State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, in which the Attorney General was held to be authorized to bring an action in the name of the state to enjoin the defendant from charging illegal and unauthorized rates. The court in this latter case quoted an early New Jersey case as follows: " 'In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by

what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment.'" The court in State ex rel. Sorensen v. State Board of Equalization & Assessment, *supra*, further said: "By the great weight of authority, it is now held that the attorney general is clothed and charged with all the common-law powers and duties except in so far as they have been limited by statute. The duties of his office are so numerous and varied that it has not been the policy of different state legislatures to enumerate them. As the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require." See, also, 7 Am. Jur. 2d, Attorney General, §§ 6, 11, 12, 13, pp. 6, 14-16; 7 C. J. S., Attorney General, § 8, p. 1226.

In State ex rel. Landis v. S. H. Kress & Co., 115 Fla. 189, 155 S. 823, the Supreme Court of Florida held that the rule that a person not affected by a statute cannot challenge its constitutionality did not apply to the Attorney General who was acting in the public interest. That seems applicable here.

It is argued by the appellee that the Attorney General has no standing because every action must be maintained by the real party in interest. § 25-301, R. R. S. 1943. In the present action the Attorney General brings this action in the name of the State in the public interest. See 7 Am. Jur. 2d, Attorney General, § 6, p. 6. Among the exceptions to the provision of section 25-301, R. R. S. 1943, are those provided by section 25-304, R. R. S. 1943, and include the following: "Officers may sue . . . in such name as is authorized by law, . . ."

This is an action "authorized by law" just as much as was the case in State ex rel. Sorensen v. State Board of Equalization & Assessment, *supra*. See, also, State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N. W. 616, where it was held that the Tax Commissioner in the name of the state could appeal from an order of a county board of equalization to the district court and from an adverse ruling therein to this court. Actions, such as this, by the Attorney General have the sanction of past practice. State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N. W. 2d 596.

Is there a justiciable issue in the present controversy? In the context of the allegations of the amended petition we find there is. The Tax Commissioner is charged by the Constitution and the statutes of the state with administering its revenue laws. Art. IV, § 28, Constitution of Nebraska; § 77-303, R. R. S. 1943; State v. Odd Fellows Hall Assn., *supra*. The petition alleges that, absent a declaration of unconstitutionality, the Tax Commissioner will implement the act by enforcement and the adoption of regulations. The Attorney General has taken an oath to uphold the Constitution of the State of Nebraska. Art. XV, § 1, Constitution of Nebraska. The Attorney General here acts on behalf and in the name of the state and hence on behalf of the general public. All this constitutes in our judgment a sufficient justiciable issue and present controversy within the meaning of the Declaratory Judgments Act. The act is remedial and is to be liberally construed. § 25-21,160, R. R. S. 1943.

L.B. 945 makes several unrelated changes in the property tax laws. These are contained in sections 1, 2, and 3. Sections 4 to 11 of the act constitute completely new and separate legislation directed toward solving the difficult problem of intercounty equalization where a taxing district overlaps two or more counties. Sections 1, 2, and 3 are not related or interdependent in any way and sections 4 to 11 have no essential rela-

tionship to sections 1, 2, or 3. All the sections have in common is that they relate to property taxation.

Section 1 amends section 77-112, R. S. Supp., 1969. It recites some of the factors to be considered in the determination of actual value of property for taxation. The amendment affects factor (4) which now reads, "reproduction costs less *regular annual* depreciation." The amendment adds the words *"regular annual."* The Attorney General states a portion of his contention with reference to this amendment in the following language: "We are, frankly, at a loss to know exactly what is meant by 'regular annual' depreciation, as applied to reproduction cost. We presume that this section, before its amendment, meant that in determining actual value of property the assessor could, among other things, take into account what it would now cost to reproduce the property, taking into account the fact that the reproduced property would be new, and that the actual property was used, and therefore should be depreciated. But what is 'regular annual' depreciation? Depreciation for federal income tax purposes is based on the cost basis of the property, not on reproduction cost. Are we to deduct depreciation based upon the particular taxpayer's cost basis from the reproduction cost, or are we to find the reproduction cost, and base the depreciation on that cost, and deduct a certain percentage each year? The statute does not say. Furthermore, the reproduction cost for the same property may vary from year to year, as prices and labor costs fluctuate. If we base the depreciation on the reproduction cost, instead of the acquisition cost, it, too, will vary from year to year. We are simply unable to ascertain what the Legislature intended by this amendment." His contentions are well taken.

If the provision as amended is construed to authorize the use of the depreciation used by the taxpayer for federal income tax purposes then several problems are encountered. Depreciation for income tax purposes is applied to the taxpayer basis in that property. This

may or may not be the "value" of the property under Article VIII, section 1, Constitution of Nebraska. Further, as so construed the amendment would violate the uniformity provisions of the same section. In addition, authorized methods of taking depreciation for income tax purposes vary from taxpayer to taxpayer. This too would violate the uniformity provision. Section 1 of L.B. 945 is in our opinion clearly unconstitutional as being in violation of Article VIII, section 1, Constitution of Nebraska.

Section 2 of L. B. 945 amends section 77-202, R. S. Supp., 1969. That section exempts certain classes of personal property including household goods from taxation. Subsection (d) adds the emphasized words so it now reads: "Household goods, *including major appliances either attached or detached to real property,* and personal effects when such property is not owned or used for financial gain or profit to either the owner or user." Article VIII, section 2, Constitution of Nebraska, provides in part as follows: "Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part, as may be provided by general law, and the Legislature may prescribe a formula for the determination of value of household goods and personal effects." The key question here is the intention of the amenders of the Constitution as they relate to the words "as defined by law." Is the power of definition given to the Legislature? Or did the framers of the amendment intend to adopt the common law concepts relating to fixtures? See § 77-103, R. R. S. 1943. The answer is not immediately apparent. This is a matter on which the court should have the benefit of briefs by both sides. The introduction of evidence on the issue might be pertinent.

Section 3 of L.B. 945 amends section 77-203, R. S. Supp., 1969, by making real property taxes due and payable December 31, next following the date of the

levy, instead of January 1. Clearly this provision creates no constitutional problem.

As already noted, sections 4 to 11 constitute completely new and independent legislation pertaining to the complex problem hereinbefore noted. The constitutionality of these sections is attacked on several grounds. The answers are not readily apparent and again the court should have the aid of briefs by both parties. Evidence may be pertinent and helpful.

The Attorney General attacks the constitutionality of the act because it contains more than one subject contrary to the provisions of Article III, section 14, Constitution of Nebraska. The act contains a severability clause. It appears to us that sections 1, 2, and 3, and sections 4 to 11 are not interdependent and none are the inducement of the passage of the other. We reject the constitutional attack based on Article III, section 14.

The order of dismissal by the trial court is reversed and the cause remanded to the district court for further action in accordance with this opinon.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. JOHN M. BUSH ET AL., APPELLEES.
199 N. W. 2d 704

Filed July 28, 1972. No. 38303.

1. **Public Lands: Improvements: Landlord and Tenant.** The burden of establishing the ownership of a compensable interest in "improvements" on school land leases is on the lessee. That burden may be satisfied by proof of purchase, or proof that the lessee personally placed the improvements on the land, or proof that they were acquired by gift.
2. ———: ———: ———. The presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in the tenant nor satisfy the burden of proving ownership.

3. ———: ———: ———. The fact of ownership of improvements does not establish a right to receive compensation nor determine any valuation of such improvements.
4. **Public Lands: Improvements.** Fencing by tenants of school lands does not require approval from the Board of Educational Lands and Funds.
5. **Public Lands: Crops: Landlord and Tenant.** In the absence of agreement, a tenant on school lands has a compensable interest in the crops, annual or perennial, growing on such lands on the date of termination of his lease.
6. **Public Lands: Improvements: Landlord and Tenant: Statutes.** In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" or crops compensable under the school land lease statutes.

Appeal from the district court for Franklin County: NORRIS CHADDERDON, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellant.

No appearance for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is a statutory declaratory judgment action to determine the ownership of certain fencing and alfalfa located on school land in Franklin County, Nebraska. The district court determined that the defendants lessees held a compensable interest in the fencing and the alfalfa and dismissed the action. The Board of Educational Lands and Funds has appealed.

The plaintiff Board of Educational Lands and Funds is the owner of the quarter section of land involved here, which is a part of the school lands of the State of Nebraska. Approximately 2½ miles of permanent wood post and wire fencing is located on the land. There were also 11 acres of alfalfa which had been on the land for 8 years at the time of the trial. No permission had been requested or given to construct any of the fencing. The defendants leased the land from the plaintiff for a period

of 12 years effective January 1, 1958, and expiring December 31, 1969. The lease had been extended on a year-to-year basis until December 31, 1971. Prior to the defendants acquiring the lease, the land had been leased to a Mrs. McCracken. There was no evidence as to who put the fences on the land originally. The evidence of a fieldman for the plaintiff indicated that the fences were 50 or 60 years old, while the defendants lessees believed the fencing was placed on the land in 1930. Defendant John Bush testified that at the time he entered upon his lease, he made an agreement with Mrs. McCracken, the previous lessee on the land, as to the fences. She told him that he could have them and she voluntarily gave them to him, although she didn't think they were "any good." Thereafter during the period of defendants' lease, approximately $500 was expended by the defendants in repairing and maintaining the fences.

The board asserts that the common law rules apply and the fencing and alfalfa become the property of the board at the expiration of the lease. In effect the board contends that since the defendants paid nothing for the fences at the time they acquired their interest in them from the preceding lessee, they cannot have any ownership or compensable interest in the fences.

The burden of establishing the ownership of a compensable interest in "improvements" on school land leases is on the lessee. That burden may be satisfied by proof of purchase, or proof that the lessee personally placed the improvements on the land, or proof that they were acquired by gift. The evidence here was sufficient to establish a gift of the fencing to the defendants.

The presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in the tenant nor satisfy the burden of proving ownership. The fact of ownership of improvements does not establish a right to receive compensation nor determine any valuation of such improvements.

The board relies upon the fact that no permission was requested or granted for the fences. That position ignores the holding in Banks v. State, 181 Neb. 106, 147 N. W. 2d 132. We held there that because fencing was specified for appraisal and compensation between succeeding tenants but was not specified as one of the "improvements" requiring approval by the board, tenants were not required to obtain approval for fencing, even though it was placed on the land after 1953. Banks also held that the lessee of school lands had a compensable interest in growing crops derivative from the school land statutes entirely distinct from common law rules.

At least since 1953, statutes requiring appraisal and compensation as between successive lessees have continuously included "plowing for future crops, and alfalfa or other crops growing thereon." See §§ 72-240.06, R. S. Supp., 1953 (repealed 1967), and 72-240.18, R. S. Supp., 1969. The statutes since 1967 have specified separate standards for determining the value of annual and perennial crops and both of them must be valued as of the date of expiration of the lease. See § 72-240.18, R. R. S. 1943. In the absence of agreement, a tenant on school lands has a compensable interest in the crops, annual or perennial, growing on such lands on the date of termination of his lease. We find no reason to depart from Banks v. State, *supra*, nor from State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769. In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" or crops compensable under the school land lease statutes.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I dissent on the ground set forth in my dissent in State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769.

I additionally dissent for the reason that the record very clearly shows the fences were on the land when the defendants acquired the lease; that they paid nothing for the fences; and that there is no record of anyone ever requesting or receiving permission to put the fences on the land.

With reference to the alfalfa, the defendants offered no evidence of their claimed ownership, and the plaintiff's ownership of it is supported by Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436.

WHITE, C. J., and NEWTON, J., join in this dissent.

CARL L. BARTLETT, APPELLANT, V. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.
199 N. W. 2d 828

Filed July 28, 1972. No. 38350.

1. **Administrative Law: Constitutional Law.** The granting of administrative discretion is not an unconstitutional delegation of a legislative function where adequate standards to guide the exercise of such discretion are provided by the statute authorizing it.
2. **Administrative Law: Licenses and Permits.** The power to withhold a license for good cause as well as standards defining good cause need not be expressly delegated where, by fair implication, in light of the statutory purpose, such power has been implicitly delegated.
3. ———: ———. In the absence of mandatory statutory requirements, the power vested in an officer or board to grant licenses carries with it, expressly or impliedly, the power to exercise reasonable discretion in granting or refusing licenses.
4. ———: ———. The power to refuse a license is coextensive with the power to revoke.
5. ———: ———. Where the State Real Estate Commission has power to revoke a salesman's license upon specific grounds, it may properly refuse to issue a license initially upon the same grounds.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Swartz, Wieland and Marolf, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

The State Real Estate Commission, after a hearing, denied plaintiff Carl L. Bartlett a license as a real estate salesman. The district court affirmed the decision of the commission and dismissed the appeal.

Plaintiff made application to the State Real Estate Commission for a license as a real estate salesman and passed the written examination. The commission thereafter ordered plaintiff to show cause why his application for a real estate salesman's license should not be denied. Specific charges were set out in the order. The hearing before the State Real Estate Commission was held on October 6, 1970. At that hearing evidence was introduced which established that on January 7, 1970, the Department of Insurance of the State of Nebraska had revoked the plaintiff's insurance salesman's license after finding he had engaged in multiple acts of fraud, misrepresentation, and dishonest practices. These acts involved commingling and improper use of funds of several insurance clients in various amounts, totalling approximately $8,000. The order of revocation of the Department of Insurance provided that the plaintiff would not be allowed to apply for any license or permit from the Nebraska Department of Insurance for a period of 5 years from the date of revocation.

In addition to the evidence of the proceedings before the Department of Insurance, it was also established that on April 3, 1970, a misdemeanor complaint had been filed in the county court of Lancaster County, Nebraska, charging the plaintiff with having obtained money by false pretenses with intent to cheat and defraud. Plaintiff entered a plea of nolo contendere, was found guilty as charged, and fined $100.

The plaintiff contends that the commission has no authority to deny a license to any individual who possesses the qualifications required by statute for the issuance of a license. He also contends that if discretion were granted by statute to the commission, it was undefined and without standards, and constitutes an unconstitutional delegation of legislative power.

Section 81-876, R. R. S. 1943, provides that no salesman's license shall be issued to any person who has not attained legal age; or is not a citizen of the United States; or is not a high school graduate or the holder of a certificate of equivalency. The applicant for a license must pass a written examination covering generally the matters confronting real estate brokers and salesmen. Failure to pass the examination shall be grounds for denial of the license without further hearing.

Section 81-879, R. R. S. 1943, provides: "The commission shall have the full power to regulate the issuance of licenses and to revoke or suspend licenses issued under the provisions of sections 81-862 to 81-887."

Section 81-881, R. R. S. 1943, provides in part: "The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any real estate broker or any real estate salesman and shall have the power to revoke or suspend any license, issued under sections 81-862 to 81-887, whenever the broker or salesman has been found guilty of any of the following unfair trade practices: * * *." There follow 20 numbered specifications among which the following are relevant: "(3) failing to account for and remit any money coming into his possession belonging to others; * * * (15) the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman, whether of the same or of a different character as hereinbefore specified; (16) commingling the money or other property of his principals with his own or failure to maintain and deposit in a separate account all money received by a real

estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; * * * (20) the broker or salesman shall have been convicted of a felony * * *."

Section 81-882(1), R. R. S. 1943, provides: "Before the commission shall deny any application for a license or before revoking or suspending such license, it shall give the applicant or holder of the license, as the case may be, a hearing on the matter and shall, at least twenty days prior to the date set for the hearing, notify the applicant or license holder in writing. Such notice shall contain an exact statement of the charges against him and the date and place of hearing." This statute obviously constitutes a specific delegation of discretionary authority as to the granting of an application for a license as well as for the revocation or suspension of a license already granted. The statute was fully complied with here. It must be noted, however, that nowhere in the real estate statutes is the commission given the authority in so many words to exercise its discretion to determine whether or not an applicant is a fit and proper person to engage in the licensed business nor has the commission adopted any rules of its own applicable to this issue.

Plaintiff's argument is that once the examination has been passed and the statutory qualifications have been met, the duty of the commission in issuing a license is purely ministerial. Plaintiff's position is that any United States citizen who is of legal age, has been graduated from high school, and passed the examination must be given a real estate salesman's license; and that any purported exercise of discretion by the commission would be unconstitutional as an improper delegation of legislative power. We disagree.

It is elemental that the method and manner of enforcing a law must of necessity be left to the reasonable discretion of administrative officers. The granting of

administrative discretion is not an unconstitutional delegation of a legislative function where adequate standards to guide the exercise of such discretion are provided by the statute authorizing it. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451.

While the statute here does not expressly provide that applicants for a real estate salesman's license must be of good moral character or must be fit and proper persons to engage in the business, we think such a requirement is implicit in the qualifications necessary for a license. It is also made more explicit in other portions of the commission statutes. The power to withhold a license for good cause as well as standards defining good cause need not be expressly delegated where, by fair implication, in light of the statutory purpose, such power has been implicitly delegated. See Barton Trucking Corp. v. O'Connell, 7 N. Y. 2d 299, 165 N. E. 2d 163. Under sections 81-876 and 81-879, R. R. S. 1943, the commission has implicit discretion to pass upon the fitness of an applicant for a license.

A thorough examination of the statutes here reflects the clear intent of the Legislature to vest full power in the commission to regulate the issuance of licenses. The rule is that in the absence of mandatory statutory requirements, the power vested in an officer or board to grant licenses carries with it, expressly or impliedly, the power to exercise reasonable discretion in granting or refusing licenses. See Arrow Express Forwarding Co. v. Iowa State Commerce Commission, 256 Iowa 1088, 130 N. W. 2d 451.

The plaintiff takes the position that section 81-881, R. R. S. 1943, has no application to an applicant for a license nor to the conduct of an applicant prior to his application, but instead applies only to revocations or suspensions of persons already licensed. Of course, the language of the section specifically applies only to revocations or suspensions, but it does contain extensive legislative standards for the guidance of commission

discretion. At least some of those standards which are relevant here are not limited to the actions done in carrying on the real estate business. Failing to account for and remit any money coming into his possession belonging to others; demonstrating unworthiness or incompetency to act as a broker or salesman, whether of the same or a different character as previously specified; and conviction of a felony are at least three specific standards which are not limited to carrying on the particular business of real estate. The power of the commission to revoke or suspend is unquestioned and the standards are thoroughly and adequately expressed. Courts have consistently taken the position that the power to refuse a license is coextensive with the power to revoke. See Arrow Express Forwarding Co. v. Iowa State Commerce Commission, 256 Iowa 1088, 130 N. W. 2d 451; Bankers Union Life Ins. Co. v. Read, 182 Okla. 103, 77 P. 2d 26.

Where the commission has power to revoke a salesman's license upon specific grounds, it may properly refuse to issue a license initially upon the same grounds. It would be an exercise in pure futility to require the commission to issue a license and then immediately revoke it. There is also no reasonable justification for requiring the commission to ignore the character or fitness of an applicant and to shut its eyes to all prior conduct of an applicant simply because the statute failed to specify those requirements in detail.

There was evidence in the record that an unrelated individual who held a real estate broker's license had been convicted of a felony and that his license was revoked for that reason. After that individual had served time in the Nebraska Penal and Correctional Complex, he was released from confinement and sometime thereafter his real estate broker's license was reinstated by the commission. The record does not reflect the evidence before the commission at the time of reinstatement of that license, nor the circumstances surrounding

that action of the commission. Neither is the reasonableness of that action at issue here. What the commission may or may not have done with respect to some other license and whether or not that action was reasonable does not change the facts of this case. An administrative determination within the jurisdiction of the commission, supported by substantial evidence in the record and a reasonable basis in the law, is not arbitrary nor capricious. See Barton Trucking Corp. v. O'Connell, 7 N. Y. 2d 299, 165 N. E. 2d 163.

The action of the commission here was reasonable and did not constitute an abuse of discretion. The judgment of the district court is affirmed.

AFFIRMED.

THE TILDEN BANK, A STATE BANKING CORPORATION, APPELLEE, V. MILTON M. RETZLAFF, APPELLANT, IMPLEADED WITH EDITH RETZLAFF, APPELLEE.

199 N. W. 2d 734

Filed July 28, 1972. No. 38416.

1. **Pleadings: Actions: Set-Off and Counterclaim.** A cross-petition or cross-claim is not limited to an equitable action under our procedure. It is the substance of the action rather than the form of it which will determine the availability of the relief. The criterion to be applied is that the issues raised by the cross-bill must be so closely connected with the cause of the action in the original suit that a cross-claim is a mere auxiliary or dependency upon the original action.
2. ———: ———: ———. New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action.
3. ———: ———: ———. The matters set up in the cross-petition must be germane to the original suit under the code quite as much as under the chancery practice.
4. **Motions, Rules, and Orders: Set-Off and Counterclaim.** The proper manner in which to challenge the appropriateness of a counterclaim is by motion to strike.

5. **Pleadings: Torts: Contracts: Set-Off and Counterclaim: Bills and Notes.** A claim for damages for tort cannot be used as a set-off against actions on contracts or suits on promissory notes secured by real estate mortgages.

Appeal from the district court for Pierce County: GEORGE W. DITTRICK, Judge. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, Richard H. Williams, and Lynn Hutton, for appellant.

Thomas E. Brogan, for appellee Tilden Bank.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an action to foreclose a real estate mortgage. The note and mortgage in issue were dated April 24, 1968, in the principal amount of $358,000. The undisputed evidence and the stipulations of the parties entered into show that at the time of the decree of foreclosure there was a principal balance due the plaintiff bank of $121,895.59. The only real issue in this case is whether the district court was correct in striking a pleading filed by the defendants entitled "Amended Answer and Cross-Petition." After the striking of the amended answer and cross-petition, there being no issue under the stipulation of the parties in the evidence as to the consideration for, the execution and the signature of the note and mortgage, or the balance due, the district court entered a judgment and the decree of foreclosure. We affirm the judgment of the district court.

The cross-petition sounds in tort. A desire for brevity forbids setting it out in full. The defendants allege that the plaintiff bank conspired to financially and personally ruin and destroy the defendant, his personal life, and his business interests; that the plaintiff conspired with one Gary P. Bauman, its president, and intention-

ally disrupted Milton Retzlaff's feeding program by not allowing Milton Retzlaff to cut enough ensilage; that the plaintiff bank conspired to force such defendant to take his livestock to market at inopportune times; that the plaintiff bank and Gary P. Bauman maliciously, in bad faith, and without justification revealed confidential aspects of defendant Milton Retzlaff's dealings with the Tilden bank, and made unjustified, bad faith statements regarding the business and financial condition of said Milton Retzlaff; that the plaintiff bank interfered with the personal life and marriage of defendant; that the plaintiff bank forced defendant against defendant's will, and for personal reasons, to discontinue purchasing commercial feed; and that the plaintiff bank conspired to employ improper banking methods toward the account of the defendant and did mishandle the money that was paid to the plaintiff bank from sales of livestock by defendant.

Our statute, section 25-813, R. S. Supp., 1969, permits the filing of a counterclaim or a cross-petition in response to the claim of a plaintiff, under certain circumstances. This court has long interpreted this statute as requiring the counterclaim to be *germane* to the original suit. Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51. We have recently reaffirmed that holding in Rogers v. Western Electric Co., Inc., 179 Neb. 359, 138 N. W. 2d 423, in which we reviewed the authorities and discussed the elements of a proper cross-petition in detail as follows: "The criterion to be applied is that the issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that a cross-claim is a mere auxiliary or dependency upon the original action. The new issues which a defendant may introduce by a cross-claim are to be limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim for relief. If a defendant in

filing a cross-bill attempts to go beyond this and to introduce new and distinct matter not essential to the proper determination of the issue put in litigation by the original bill, although he may show a perfect case against either the plaintiff or one or more of his co-defendants, his pleading will not be permitted as a cross-bill. New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action."

It is clear from the record in this case that there is no dispute as to the consideration for, and the execution and validity of, the real estate mortgage in the original sum of $358,000. The subject matter of the original petition was the simple issue of the determination of the validity of a promissory note and mortgage and the amount due thereon. From what we have said it appears that new and distinct matter not necessary for the determination of these issues was injected into the case by the purported cross-petition. The alleged conspiracy is not connected with the original foreclosure petition, and the new issues sought to be injected into the case are not necessary for a just and complete resolution of the issues raised in the petition to foreclose the note and mortgage. It is an attempt to litigate a tort action for conspiracy, a completely independent cause of action, serving to distort and confuse the resolution of the action to determine the validity of a contract and the mortgage security therefor. See, Weller v. Putnam, 184 Neb. 692, 171 N. W. 2d 767; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649: O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; 20 Am. Jur. 2d, Counterclaim, Recoupment, Etc., § 70, p. 287. We come to the conclusion that the claim set out in the purported cross-petition is independent and unrelated to the original cause of action and cannot be litigated by cross-action in the nature of a cross-petition or counterclaim. The proper manner in which to challenge the appro-

priateness of a counterclaim is by motion to strike. Weller v. Putnam, *supra.*

The conclusionary allegation that the claim for conspiracy arose from the mortgagor-mortgagee relationship, described in the original petition, is not sufficient. See, Benes v. Matulka, 182 Neb. 744, 157 N. W. 2d 382; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104; Brugman v. Burr, 30 Neb. 406, 46 N. W. 644.

A claim for damages for tort cannot be used as a set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. 55 Am. Jur. 2d, Mortgages, § 615, p. 581; Benes v. Matulka, *supra;* Watts v. Gantt, *supra;* Vanderlip v. Barnes, 101 Neb. 573, 163 N. W. 856.

The defendant appellant still insists that his amended answer should not have been stricken because he asserts he alleged in the amended answer that the plaintiff had fraudulently induced the execution of the mortgage by "promising Defendant that the Tilden Bank would charge him one per cent less interest than the Credit Production was charging Defendant, and that Defendant would save money by dealing with Plaintiff bank." This is insufficient. None of the plaintiff's actions constituting the alleged fraud are set out. There is no allegation of what the interest rate of "Credit Production" was, and no allegation that such a representation, if made, had been breached by the plaintiff bank. See Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654. Furthermore, it is clear that such an allegation could not be a defense to the foreclosure of the mortgage, but would only relate to a mitigation of the amount due as interest.

It further appears that the note and mortgage were executed on April 25, 1968. This action was filed on February 5, 1971. The amended answer containing the allegation referred to was filed on June 14, 1971. The parties are bound by a stipulation which they jointly filed in this case on November 29, 1971, over 5 months

after the filing of the amended answer herein. In this stipulation, paragraph 1(e), they stated that they had executed an agreement on June 6, 1969, relative to the liquidation of the defendants' assets, and agreed that it should be incorporated into the stipulation. Exhibit E recites (over 1 year after the incurrence of the original indebtedness) that the defendants were indebted to the First National Bank of Omaha in the principal amount of $225,044.72 and the Tilden Bank in the principal amount of $35,000. The stipulation on November 29, 1971, paragraph 1(f), recites as follows: "(f) That the record of this loan transaction with the defendants, including the dates of advances, amounts of advances, credits to defendants, payments by defendants, participation by the First National Bank of Omaha, and the loan balances from time to time, and presently, *are* as set forth on Exhibit 'F' attached hereto, and incorporated herein by reference." (Emphasis supplied.) The balance due on principal and interest recited in the judgment and decree in this case is in conformity with the amounts set out in exhibit F. This stipulation and the recitals therein are binding on the parties hereto and obviously foreclose any claim as to a reduction of the balance due arising from the misrepresentation as to the interest rate, especially since it was filed in the action subsequent to the time of the allegation of the amended answer.

The judgment of the district court in striking the amended answer and the cross-petition and finding for plaintiff is correct and is affirmed.

AFFIRMED.

ROGER L. GREEN, APPELLANT, V. VILLAGE OF TERRYTOWN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

199 N. W. 2d 610

Filed July 28, 1972. No. 38545.

Judgments: Parties: Appeal and Error. Where there are multiple defendants and a judgment is entered dismissing the action as to one or more, but not all, defendants, the judgment is a final and appealable order.

Appeal from the district court for Scotts Bluff County: TED R. FIEDLER, Judge. On motion to dismiss appeal. Appeal dismissed as to defendant Terrytown.

Lyman, Meister & Olsen, for appellant.

Wright & Simmons, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

In this action plaintiff sued the Village of Terrytown and two individual defendants alleging negligence resulting from leaving an unlighted obstruction in a street where new paving had been laid. The pleadings do not indicate the relationship existing between the village and the other two defendants. They may have been employees of the village or employees of the contractor. The court dismissed the action as to the defendant Terrytown. No appeal was taken from this judgment within the time allowed by statute. Subsequently the court dismissed the action as to the other two defendants and plaintiff seeks to appeal as to all three of the defendants. Terrytown has moved for a dismissal of the appeal as to it because it was not taken within 1 month from the order dismissing the action and overruling the motion for new trial as to Terrytown.

Nebraska does not appear to have passed directly on this proposition. The basic reasons are highlighted in 4 Am. Jur. 2d, Appeal and Error, § 48, p. 570. It is

therein stated that a paramount consideration is to be liberal in permitting appeals, but, on the other hand, that piecemeal or successive appeals are not desirable. It would appear there is a further consideration, namely that where there are multiple defendants and the action is dismissed as to one defendant, that defendant no longer has a voice in the determination of the litigation and if the remaining parties permit the litigation to drag on for months or years, he has no way of bringing an end to the litigation or ascertaining whether or not it has been finally determined as to him. This is a very important consideration in determining whether or not such an order of dismissal is a "final order."

In 4 Am. Jur. 2d, Appeal and Error, § 54, p. 576, and in 4 C. J. S., Appeal & Error, § 104 b, p. 292, the impression is conveyed that under the majority rule a dismissal or nonsuit as to one or more of several parties is not ordinarily regarded as final. Some comparatively recent cases sustaining this view and holding that the dismissal as to a codefendant is not appealable are: McDaniel v. Lovelace (Mo. App.), 392 S. W. 2d 422; Dudeck v. Ellis (Mo.), 376 S. W. 2d 197; Linkous v. Darch (Ky. App.), 299 S. W. 2d 120; Pan American Petroleum Corp. v. Texas Pac. C. & O. Co. (Tex. Civ. App.), 320 S. W. 2d 915; Bradley v. Holmes, 242 Miss. 247, 134 So. 2d 494; In re Old Colony Coal Co., 49 N. J. Super. 117, 139 A. 2d 302; Reuter v. City of Oskaloosa, 253 Iowa 768, 113 N. W. 2d 716; Wilmurth v. State, 79 Nev. 490, 387 P. 2d 251; Martin v. City of Ashland, 233 Ore. 512, 378 P. 2d 711. These cases apparently hold that an order is not final unless it disposes of *all* the issues as to *all* parties.

On the other hand, there are several cases which hold that dismissal of an action as to one party is appealable. See, Newberger v. Pokrass, 27 Wis. 2d 405, 134 N. W. 2d 495; Schneider v. Manheimer (Fla. App.), 170 So. 2d 75; Adams v. Allstate Ins. Co., 58 Wash. 2d

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We hold that the dismissal, as to the defendant Terrytown, was a final and appealable order and that the failure to complete an appeal within the required time necessitates a dismissal of the appeal as to this defendant.

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3. Information supplied to judicial officer issuing arrest warrant on sworn complaint may be supplemented by additional information which arresting officers themselves have or have acquired before arrest and which is corroborative of complicity of arrestee in crime. State v. Rice ---------- 728

Assumption of Risk.

Where reasonable minds might differ as to whether risk assumed, jury question presented. Demont v. Mattson ---------- 277

Attorney and Client.

By statute, party may recover prejudgment interest and an attorney's fee on claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented claim 90 days prior to commencement of suit; compliance with condition mandatory. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669

Attorney General.

1. Attorney General may on his own relation in name of State of Nebraska bring action for declaratory judgment challenging constitutionality of statute which Tax Commissioner of State proposes to implement by enforcement and regulation pursuant to duties imposed upon that officer by statute and Constitution. State ex rel. Meyer v. Peters ------- 817
2. Rule that person may not attack constitutionality of statute where his rights not thereby affected applies to private persons and not to Attorney General who is acting in public interest. State ex rel. Meyer v. Peters ---------- 817

Attorneys at Law.

1. Record must support claim of ineffective counsel. State v. Rose ---------- 84
2. Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130
3. When counsel has advised defendant to plead guilty, defendant who heeded such advice may not subsequently attack voluntariness of guilty plea so long as counsel's advice within range of competence demanded of attorneys in criminal cases. State v. Hall 130
4. That guilty plea must be intelligently made, not a requirement that all advice offered by defendant's lawyer withstand retrospective examination in post conviction hearing. State v. Hall ---------- 130
5. Absolute privilege to publish false and defamatory matter in complaint made to committee on inquiry

of Nebraska State Bar Association regarding alleged misconduct of attorney where defamatory matter related thereto. Sinnett v. Albert ---------- 176
6. Against sound principles of professional ethics for one who knows he is to be called as material witness in case to appear as attorney therein. Sinnett v. Albert ---------- 176
7. Party who appears pro se subject to and will receive same consideration as if he had been represented by attorney. Martin v. Martin ---------- 393
8. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v. Martin -- 393
9. Reasonable attorney's fee to be determined by nature of case, amount involved in controversy, results obtained, and services actually performed therein, including length of time necessarily spent in case, care and diligence exhibited, and character and standing of attorney. Junker v. Junker ---------- 555
10. In determining fairness of award for attorney's fee, consideration may be given to provisions of Nebraska State Bar Association Minimum Fee Advisory Schedule. Junker v. Junker ---------- 555
11. While trial courts and appellate courts equally regarded as experts on value of legal services, trial court ordinarily has better opportunity for practically appraising situation, and appellate court will interfere only to correct patent injustice where allowance clearly excessive or insufficient. Junker v. Junker ---------- 555
12. Attorney at law who is attorney for party in any proceeding in any court of this state shall not be disqualified as person before whom affidavit made by reason of such representation. Frazier, Inc. v. 20th Century Builders, Inc. ---------- 618

Banks and Banking.

Director of bank must exercise ordinary care and prudence in administration of affairs of bank; must exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances and give same degree of care and prudence as generally exercised by men in their

own affairs. Department of Banking v. Colburn -- 500

Bills and Notes.

1. Issue means first delivery of an instrument to a holder or a remitter. State of Kansas v. Holeb -- 319
2. Delivery means voluntary transfer of possession. State v. Kansas v. Holeb ---------- 319
3. When person is first party to transaction to make use of mails and thereby effects delivery of instrument, he has made postal service his agent. State of Kansas v. Holeb ---------- 319
4. Unless otherwise specified, consent to extension of promissory note authorizes single extension for not longer than original period of note. Citizens State Bank v. Beermann Bros. Dehy ---------- 597
5. Agreement by holder to suspend right to enforce promissory note against maker, without consent of endorser and without express reservation of rights against him, discharges endorser from liability. Citizens State Bank v. Beermann Bros. Dehy ---- 597
6. To remove bar of statute, debtor must unqualifiedly acknowledge existing liability. Degmetich v. Beranek ---------- 659
7. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

Bonds.

1. Execution and approval of undertaking required in cited statute directory only. Neumeyer v. Omaha Public Power Dist. ---------- 516
2. Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516
3. In appealing from decree of foreclosure which orders sale of land, supersedeas bond should be conditioned as set out in cited statute, and amount of pledge matter of judicial discretion; in appealing from decree of foreclosure which directs payment of money and also orders sale of real estate, court may require supersedeas bond in amount computed as specified in said statute. The Exchange Bank v. Mid-

Nebraska Computer Services, Inc. ---------- 673
4. Appellate court required to permit amendment of defective appeal bond or order filing of new bond in furtherance of justice. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
5. Appeal bond within purview of statute which requires court to disregard defects not affecting substantial rights of adverse party. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. --- 673

Boundaries.

1. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns ---------- 304
2. Fixed monuments and surveys staked out on ground control over field notes showing courses, distances, and quantities; or description of survey in words; or picturization of survey in plat. Phillippe v. Horns ---------- 304

Brokers.

1. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
2. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
3. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
4. Broker precluded from recovering compensation for his services when selling land of his principal if guilty of misconduct in negotiating contract at variance with one which he is authorized to make, or disobeys his principal's orders or instructions,

or causes loss to his principal by reason of his negligence in drawing or negotiating contract of sale for his principal. Wisnieski v. Harms ------ 721

Buildings.

1. In absence of some contractual provision to contrary, risk of loss or damage by windstorm, fire, etc., to new building in course of construction normally on builder. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
2. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. 308

Cancellation of Instruments.

1. Erroneous statement by insurer to insured that insurance policy has lapsed for alleged nonpayment of premium not legal equivalent of notice of election to cancel under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
2. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman -- 756
3. Public policy forbids that deeds and mortgages of real estate, duly authenticated in mode pointed out by statute, should be set aside except upon clear and convincing proof that certificate of acknowledgment false. Gaeth v. Newman ---------- 756

Carriers.

1. Failure of Railway Commission previous to January 1, 1968, to enunciate rule and regulation on tacking cannot be construed to imply right to tack inherent in certificates heretofore issued unless specifically restricted. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
2. Right to prohibit tacking of regular to irregular route authorities, or irregular to irregular route authorities, policy determination within inherent authority of Railway Commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
3. Common carriers cannot acquire prescriptive rights

by virtue of unauthorized use of routes. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223

4. Tacking is extension of authorized service; must be and is under regulation of Railway Commission rather than being left to unbridled discretion of carriers subject to regulation by commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223

5. In determining issue of public convenience and necessity, in cases where new or extended operating rights sought, controlling questions whether operation will serve useful purpose responsible to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in specified operation without endangering or impairing operations of existing carriers contrary to public interest. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400

6. Purpose of Nebraska Motor Carrier Act was regulation for public interest. Purpose not to stifle legitimate competition but to foster it; purpose not to create monopolies in transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition normal attribute of free enterprise system and must be permitted to exist and law contemplates that it shall. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400

7. In granting certificate of public convenience and necessity, Railway Commission, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service, and second, that service offered is or will be required by present and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474

8. Contract carrier one, other than common carrier, which furnishes transportation service to meet special needs of individual shipper or shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

9. In considering application for permit as contract carrier, Railway Commission required to weigh special needs of shippers desiring contract carrier serv-

ice; effect on protesting carriers of grant of application and effect on shippers of denial factors to be weighed in determining if grant of application consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

10. Burden upon applicant for permit as contract carrier to show that proposed service specialized and fits need of proposed contracting shippers, that applicant fit, willing, and able to perform service, and that proposed operation will be consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

11. Where transportation of specified commodities can be performed as well by common carriers as by contract carriers, need for contract carriers not established. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

12. If competent proof made by applicant showing proposed service specialized and needed, and protested by common carriers showing willingness and ability to perform it, applicant must then establish he is better equipped and qualified to meet special needs of proposed contracting shippers than protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

13. Adequacy of existing services to perform normal needs of proposed contracting shippers not conclusive where new service better designed to fit special requirements of proposed contracting shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

14. Where is evidence to sustain factors for and against issuance of permit to contract carrier, required to be considered by Railway Commission by cited statutes, determination of public interest for commission and not courts. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

15. Past unlawful actions do not necessarily bar on grounds of unfitness future grants of operating authority if public interest will best be served by approval. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

Case Overruled.

Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation

& Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516

Charities.

1. Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under rules of law. Garwood v. Drake University ---------- 305
2. If dominant purpose of charitable trust certain, it will not be denied execution because of absence of perfection of detail or presence of immaterial and inappropriate language in instrument creating trust. Garwood v. Drake University ---------- 605
3. Charitable gift not permitted to fail because of any mistake or ambiguity in describing intended beneficiary or expressing its purpose if from language of bequest, when construed in light of all facts, intent of donor reasonably apparent. Garwood v. Drake University ---------- 605

Comity.

Ordinarily, effect given to prior judgment of another state determining custody of child as matter of comity unless change in circumstances requires different result. Loveall v. Loveall ---------- 457

Common Law.

Statutory provisions may cut across issue preclusion at common law. Lost Creek Drainage Dist. v. Elsam 705

Confessions.

Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130

Conspiracy.

1. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. Wright v. Haffke ---------- 270
   State v. Claire ---------- 373
2. Participation in criminal intent may be inferred

from presence, companionship, and conduct. State v. Claire ---------- 373
3. Two or more defendants may be tried together where each of defendants charged with accountability for offense or offenses or where offense part of common scheme, plan, or conspiracy. State v. Rice ------- 728

Constitutional Law.

1. Not unconstitutional for public school district to use or lease classrooms in church or other sectarian building for public school purposes if property used or leased under control of public school authorities and instruction offered secular and nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education ---------- 1
2. Legislature has plenary legislative authority limited only by state and federal Constitutions. Dwyer v. Omaha-Douglas Public Building Commission ----- 30
3. Language of Constitution to be interpreted with reference to established laws, usages, and customs of country at time of its adoption. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
4. Constitution must be read in connection with facts of history and development of representative form of government. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. Constitution as amended must be construed as a whole. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
6. Legislative construction of statutory or constitutional provision, although not conclusive on courts, when deliberately made, entitled to great weight. Dwyer v. Omaha-Douglas Public Building Commission 30
7. Power to tax being sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to government, but merely limitations on power which would otherwise be unrestricted. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
8. Constitutional limitations on power to tax must be strictly construed. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
9. In construing act of Legislature, all reasonable doubts must be resolved in favor of constitutionality. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

10. One-half mill levy made by Omaha-Douglas Public Building Commission under authority of L. B. 1003, 82nd Legislative Session, not county tax subject to provisions of Article VIII, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
11. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ------ 30
12. L. B. 1003, 82nd Legislative Session, which enabled cities of metropolitan class and county in which such city located to create public building commission authorized to furnish facilities for joint use of city and county pertains to matter of state concern and not just strictly municipal affair. Dwyer v. Omaha-Douglas Public Building Commission -- 30
13. L. B. 1003, 82nd Legislative Session, does not amend either section 23-119, R. R. S. 1943, or section 23-120, R. S. Supp., 1971, and therefore does not violate Article III, section 14, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
14. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
15. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article III, section 18, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
16. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article IX, sections 2, 4, or 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
17. Building for governmental purposes not work of internal improvement under provisions of Article XIII, section 2, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ----- 30
18. Tax authorized to be levied by city of metropolitan class under provisions of L. B. 1003, 82nd Legisla-

tive Session, not a tax for corporate purposes and is one levied by local authority; does not contravene Article VIII, section 7, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

19. Nebraska system of selecting jurors by use of voter registration lists constitutionally permissible. State v. Casados ---------- 91

20. Defendant in criminal case not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors drawn. State v. Casados -- 91

21. Issued motor vehicle operator's license gives rise to such legal entitlement as may not be taken away without procedural due process. Stauffer v. Weedlun 105

22. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---- 105

23. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice of hearing before such order. Stauffer v. Weedlun -------- 105

24. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105

25. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117

26. A State not constrained in exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. State v. Eckstein ---------- 146

27. Cited statute not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate provisions of Eighth Amendment prohibiting cruel and unusual punish-

ments. State v. Eckstein ---------- 146
28. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
29. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243
30. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ------ 243
31. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
32. Right to confrontation provided by Sixth Amendment to Constitution of United States not violated when witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to defendant's guilt or innocence. State v. Bittner ---------- 298
33. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb ---- 319
34. Classifications limited to and necessary for accomplishment of legitimate purposes of legislation; question always whether things or persons classified by act form by themselves proper and legitimate class with reference to purposes of act. Sandberg v. State ---------- 335
35. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335

36. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expenditures will serve public interest. Sandberg v. State ---------- 335
37. Nothing more familiar in taxation than imposition of tax upon class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for condition to be remedied. Sandberg v. State ---------- 335
38. Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State ---------- 335
39. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue 354
40. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
41. Ordinarily, if amendatory act invalid, original statute remains in effect. State v. Anderson -------- 491
42. Freedom of speech as guaranteed by First Amendment may include right to express thoughts and ideas by means other than speech. Major Liquors, Inc. v. City of Omaha ---------- 628
43. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha ---- 628
44. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
45. Although "conduct" may entail some elements of expression or speech, when "speech" and "nonspeech"

elements combined in same course of conduct, a sufficiently important governmental interest in regulating nonspeech element can justify incidental limitations on First Amendment freedoms. Major Liquors, Inc. v. City of Omaha ---------- 628
46. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha 628
47. When speech elements only incidental to course of conduct or activity, such activity in its entirety not entitled to protection of First Amendment. Major Liquors, Inc. v. City of Omaha ---------- 628
48. Affidavit for search warrant sufficient to meet standards of Fourth Amendment to Constitution of United States if complies with ruling in United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. State v. Rice ---------- 728
49. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
50. Fourth Amendment does not clearly delineate between searches which are legal and those which are illegal; only prohibits unreasonable, with each particular case being decided on own circumstances. State v. Rice ---------- 728
51. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
52. In construing constitutional amendments, consideration should be given to circumstances leading to their adoption and purpose sought to be accomplished. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
53. Supreme Court has recognized principle of constitutional interpretation that each and every clause in a constitution has been inserted for useful purpose; constitutional provisions should receive even broader and more liberal construction than stautes, and constitutions are not subject to rules of strict construction. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
54. We are indebted to the suffrage of the people for adoption of all amendments submitted and in-

deed for adoption of the original Constitution which such amendments changed. From this fact it is patent that, where language employed plain, courts should accord to it meaning which obviously would be accepted by layman. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

55. In adopting constitutional provision authorizing an Industrial Commission, it was made an independent part of Constitution of Nebraska and not as an amendment to Article II. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

56. Legislature has complete control of actions of school boards; whether or not Legislature acted wisely in premises not matter of judicial determination; courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

57. Granting of administrative discretion not an unconstitutional delegation of legislative function where adequate standards to guide exercise of such discretion provided by statute authorizing it. Bartlett v. State Real Estate Commission ---------- 828

Continuances.

1. Granting of continuance is matter within sound discretion of trial judge and denial of motion for continuance not disturbed in absence of abuse of discretion. State v. Meadows ---------- 287

2. Application for postponement of time of trial of criminal case addressed to sound discretion of trial court and, in absence of abuse of discretion disclosed by record, denial thereof not error. State v. McClelland 699

Contracts.

1. Not unconstitutional for public school district to use or lease classrooms in church or other sectarian building for public school purposes if property used or leased under control of public school authorities and instruction offered secular and nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education ---------- 1

2. Disclaimer clause in bargain relevant to issue whether claimant in fact relied on false representation disclaimed in clause. Abbott v. Abbott ---------- 61

3. In absence of otherwise binding agreement, express or implied, no privity of contract between subcon-

tractor and owner. Boyd v. Benkelman Public Housing Authority ---------- 69
4. Mutual manifestations of assent, in themselves sufficient to make contract, not prevented from so operating by mere fact parties also manifest intention to prepare and adopt written memorial thereof. Boyd v. Benkelman Public Housing Authority ---------- 69
5. Final settlement not synonymous with final payment; precedes payment and denotes proper administrative determination with respect to amount due. Boyd v. Benkelman Public Housing Authority ---------- 69
6. Final settlement occurred when administrative determination made with respect to amount due, following completion of project, which was accepted by owner. Boyd v. Benkelman Public Housing Authority ---- 69
7. As general rule, question of whether sum mentioned in contract considered as liquidated damages or penalty question of law, dependent on construction of contract by court. Abel Constr. Co. v. School Dist. of Seward ---------- 166
8. If damages arising from breach of contract difficult of ascertainment or admeasurement, and if stipulated amount not disproportionate to amount of damages reasonably anticipated from breach, usually regarded as provision for liquidated damages. Abel Constr. Co. v. School Dist. of Seward ---------- 166
9. Liquidated damages in fixed sum for each day's delay in performing construction contract, which in effect grades damages according to extent of breach, and where effect of delay difficult to estimate and daily amounts not clearly unreasonable, not penal. Abel Constr. Co. v. School Dist. of Seward -------- 166
10. Provisions in construction contracts providing requests for additional time, necessitated by cause beyond contractor's control, to complete contract must be in writing, generally binding. Abel Constr. Co. v. School Dist. of Seward ---------- 166
11. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of construction contract. Abel Constr. Co. v. School Dist. of Seward ---------- 166
12. Apparent authority is power to affect legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with other's manifestations to such

third persons. Abel Constr. Co. v. School Dist. of Seward ---------- 166
13. Engineer's authority under terms of construction contract to observe, inspect, suspend, or reject work, or make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages. Abel Constr. Co. v. School Dist. of Seward ------ 166
14. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in any respect to conform to contract. Maas v. Scoboda -- 189
15. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda ---------- 189
16. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts question of fact for jury. Maas v. Scoboda 189
17. Law regards parties as being competent to contract as they see fit with respect to satisfactory character of equipment sold, and seller assumes hazard of rendering performance according to terms of contract. Maas v. Scoboda ---------- 189
18. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
19. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
20. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ---------- 200
21. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
22. Contract should be so construed as to give effect to

intention of parties rather than defeat purpose for which it was executed. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
23. In absence of some contractual provision to contrary, risk of loss or damage by windstorm, fire, etc., to new building in course of construction normally on builder. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
24. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. 308
25. Owner who contracts to procure insurance to cover contractor and fails to do so or who procures such insurance and fails to have contractor named as an insured becomes insurer of contractor. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ------ 308
26. Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
27. Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---------- 362
28. Rule that mutuality essential element of executory contract not applicable to executed contracts or where party not bound performed its conditions. Weiner v. Hroch ---------- 389
29. General rule that for most purposes when deed made in execution of contract of sale, provisions of contract merged in deed. Weiner v. Hroch ---------- 389
30. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389
31. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair

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35. Contract restraining person from establishing business competitive with that of other party to it is strictly construed and doubts resolved against latitudinarian construction thereof. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
36. Mere leasing of personal property, without proof of other circumstances, by covenantor to existing competitor of promisee, does not constitute breach of general covenant not to compete. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
37. Terms and provisions which control in construction of coverage afforded by temporary insurance "binder" those contained in ordinary form of policy usually issued by company at that time upon similar risks. Robinson v. State Farm Mut. Auto. Ins. Co. ---------- 470
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51. In action for breach of contract, plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable court, with reasonable degree of certainty and exactness, to estimate actual damages, and if he fails to do this he can recover only nominal sum. Rambo v. Galley ---------- 692

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2. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

3. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105

4. Where upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales; such discretion judicial one which may not be arbitrarily exercised. Supreme Court will not intervene except in case of abuse of such discretion by trial court. Glaser v. Weinberger 205

5. In determining whether to accept or reject upset bid, court must elect between two conflicting duties; ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

6. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243

7. Trial court, in exercise of sound discretion, must determine whether witness' claim of privilege justifiable. State v. Bittner ---------- 298

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6. If damages arising from breach of contract difficult of ascertainment or admeasurement, and if stipulated amount not disproportionate to amount of damages reasonably anticipated from breach, usually regarded as provision for liquidated damages. Abel Constr. Co. v. School Dist. of Seward -- 166
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11. Plaintiff must not only show in breach of contract case his right of recovery, but elements and facts which compose measure of his recovery, and not leave jury to rove without guide or compass through limitless fields of conjecture and speculation. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
12. Duty of district court to refrain from submitting to jury issue of damages when evidence such that it cannot determine such issue except by indulging in speculation and conjecture. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
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16. Insurance policy insuring against all risks of direct physical loss covers damage caused by failure of boom clutch on lifting crane unless otherwise excluded in policy. Peter Kiewit Sons' Co. v. Hartford Fire Ins. Co. ---------- 553

17. Claimant of substantial damages must furnish appropriate data to enable trier of fact to find amount of damages with reasonable certainty if evidence of damages or amount thereof susceptible of definite proof; damages may not be established by conjecture, speculation, or doubtful proof. Masten v. Campbell Manuf. Co. ---------- 646

18. While measure of damages in action for breach of agreement by employee not to enter business in competition with employer usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. Rambo v. Galley ---------- 692

19. In action for breach of contract, plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable court, with reasonable degree of certainty and exactness, to estimate actual damages, and if he fails to do this he can recover only nominal sum. Rambo v. Galley -- 692

20. Measure of damages in case of breach of contract is amount which will compensate injured person for loss which fulfillment of contract would have prevented or breach of it has entailed. Ranchland Auto. Inc. v. Cleveland ---------- 804

Declaratory Judgments.

Declaratory Judgments Act remedial and to be liber-

ally construed and administered. State ex rel. Meyer v. Peters ---------- 817

Deeds.

1. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns 304
2. Fixed monuments and surveys staked out on ground control over field notes showing courses, distances, and quantities; or description of survey in words; or picturization of survey in plat. Phillippe v. Horns 304
3. General rule that for most purposes when deed made in execution of contract of sale, provisions of contract merged in deed. Weiner v. Hroch ---------- 389
4. True consideration for deed of conveyance of real estate may be shown by parol evidence, although deed recites consideration. Weiner v. Hroch ---------- 389
5. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389
6. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman ---------- 756
7. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
8. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman ---------- 756
9. In order to establish undue influence invalidating deed, must be proof that circumstances of execution

of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman ---------- 756

10. Public policy forbids that deeds and mortgages of real estate, duly authenticated in mode pointed out by statute, should be set aside except upon clear and convincing proof that certificate of acknowledgement false. Gaeth v. Newman ---------- 756

Default.

Failure of appellee to file brief in Supreme Court not concession of error; record and brief of appellant must be considered. Drainage Dist. No. 10 v. Canaday 701

Divorce.

1. In proceeding for modification of order for child support, post-decree birth is change of circumstances, although decree provided for support of unborn child. Schneider v. Schneider ---------- 80
2. Father primarily liable for support of his minor children, his liability being independent of assets of the mother. Schneider v. Schneider ---------- 80
3. Order of trial court in child support proceeding not overturned unless abuse of discretion found. Schneider v. Schneider ---------- 80
4. In determining question of who should have care and custody of children upon divorce, paramount consideration is best interests of welfare of children. Phillips v. Phillips ---------- 89
   Gydesen v. Gydesen ---------- 538
   Scripter v. Scripter ---------- 576
5. If circumstances of parties change and in best interests of children, court may from time to time revise or alter divorce decree so far as custody, care, and maintenance of children concerned. Phillips v. Phillips ---------- 89
6. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown. Phillips v. Phillips ---------- 89
7. Divorce action for trial de novo in Supreme Court; however it cannot ignore fact that trial court had opportunity to observe parties. Newton v. Newton 242
8. Judgment of trial court fixing amount of alimony

not disturbed on appeal unless good cause shown. Newton v. Newton ---------- 242
Martin v. Martin ---------- 393
9. Amount of alimony granted wife not determined alone from property possessed by husband; many other factors enter into its determination. Newton v. Newton ---------- 242
10. Fixing of amount of alimony rests, in each case, within sound discretion of court. Ramold v. Ramold 314
Hoffmann v. Hoffmann ---------- 408
11. Discretion of court respecting custody and support of minor children subject to review; determination of trial court, however, ordinarily not disturbed unless has been clear abuse of discretion or clearly against weight of evidence. Oberg v. Oberg ---------- 316
12. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair and equitable result under all circumstances. Martin v. Martin ---------- 393
13. Problems of alimony awards not subject to solution by mathematical formula; generally speaking, awards of Supreme Court in cases of this kind vary from one-half to one-third of value of property, depending on facts and circumstances of particular case. Hoffmann v. Hoffmann ---------- 408
14. Court which has personal jurisdiction of parties, both of whom are domiciled within state, may determine custody of child as between parties even though child absent from jurisdiction. Loveall v. Loveall -- 457
15. Court which has personal jurisdiction of parties may determine custody of child as between parties although child neither domiciled nor present in state. Loveall v. Loveall ---------- 457
16. On appeal in action for divorce, cause tried de novo in Supreme Court. Gydesen v. Gydesen ---------- 538
17. Divorce action triable de novo upon issues presented by appeal. Junker v. Junker ---------- 555
18. Division of property and allowance of alimony in divorce actions always determined by facts of each case. Junker v. Junker ---------- 555
19. Rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such award can be exactly determined; generally speaking, awards of Supreme Court

in such cases vary from one-third to one-half of value of property involved, depending upon facts and circumstances of particular case. Junker v. Junker ---------- 555

20. Discretion of lower court with respect to awarding custody of minor children subject to review, but determination of lower court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Scripter v. Scripter ---- 576

21. Actions in equity on appeal to Supreme Court triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Scripter v. Scripter ---------- 576

22. Division of property and allowance of alimony and child support in divorce actions always to be determined by facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. Sees v. Sees ---------- 769

23. In action for divorce, if evidence principally oral and in irreconcilable conflict and determination of issues depends to reasonable extent upon reliability of respective witnesses, conclusion of trial court given great weight, and will not be disturbed on appeal unless good cause shown. Sees v. Sees ---------- 769

24. In determining child custody, paramount consideration is best interests and welfare of children. Nemecek v. Nemecek ---------- 799

Domicile.

1. Court which has personal jurisdiction of parties, both of whom are domiciled within state, may determine custody of child as between parties even though child absent from jurisdiction. Loveall v. Loveall -- 457

2. Court which has personal jurisdiction of parties may determine custody of child as between parties although child neither domiciled nor present in state. Loveall v. Loveall ---------- 457

Drains and Drainage Districts.

1. Exactness of apportionment of benefits among landowners in drainage district impossible. Drainage Dist. No. 10 v. Canaday ---------- 701

2. Upon appeal to district court from decision of board of supervisors of drainage district, all original objections made to classification and assessment of benefits heard and determined in summary manner as in equity, and upon appeal to Supreme Court, cause tried de novo. Drainage Dist. No. 10 v. Canaday -- 701
3. When, as required by statute, district engineer has examined land and made his report to board of supervisors of drainage district which approved report, report furnishes prima facie evidence of classification and benefits, and in absence of fraud, such evidence sufficient to sustain decision of board unless decision overcome by competent evidence to contrary. Drainage Dist. No. 10 v. Canaday ---------- 701
4. Land that will not be benefited by improvement proposed by drainage district ought not be annexed to district. Lost Creek Drainage Dist. v. Elsam ------ 705

Drugs and Narcotics.

Burden of proof of exceptions within ambit of Depressant and Stimulant Drugs Act on party attempting to bring himself within exceptions. State v. Minor ---------- 23

Easements.

Easement for discharge of waste irrigation waters into natural depression, draw, or watercourse flowing through land of another cannot be acquired until it has been freely exercised without material change under claim of right for full period of 10 years. Peters v. Langrehr ---------- 480

Embezzlement.

Crime of embezzlement of public money as defined by cited statute applies only to officers or persons charged by law with performance of duties therein mentioned, and police patrolman collecting coins from parking meters as part of duties designated by his superior cannot properly be informed against thereunder. State v. Williams ---------- 565

Eminent Domain.

1. In eminent domain proceeding where part of property taken, landowner may recover value of land appropriated and depreciation in value of remainder of land; remainder generally considered land owned by

same proprietor, contiguous to land taken, and devoted to same use. Verzani v. State ---------- 162
2. In eminent domain proceeding, anticipated profits from continued carrying on of business in established location cannot be considered in estimating damages, and profits of business cannot be shown for purpose of proving value of property. Verzani v. State ---------- 162
3. Damage claimed to result from improper design or construction of highway should be pleaded specially. Verzani v. State ---------- 162
4. Damage related to traffic flow not compensable. Verzani v. State ---------- 162
5. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue ---------- 354
6. Execution and approval of undertaking required in cited statute directory only. Neumeyer v. Omaha Public Power Dist. ---------- 516
7. Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516

Employer and Employee.

1. Employer not liable for negligence of one whom his employee procures or permits to assist in work without proof that employee had authority from employer to procure or permit assistance. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
2. Where has been continuous or customary use of assistant by employee, and employer has known of this practice and acquiesced in it, employer liable for negligence of assistant as though actually employed by himself. Barkalow Bros. Co. v. Floor-Brite, Inc. 568
3. While measure of damages in action for breach of agreement by employee not to enter business in competition with employer usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. Rambo

v. Galley ---------- 692
4. In absence of special circumstances, beyond question that employee, unless contractually prohibited, may upon termination of his employment, compete with his former employer either on his own or on another's behalf. Rambo v. Galley ---------- 692

Equity.

1. Where certificate of occupancy properly obtained, in accordance with zoning statutes and ordinances, may not be arbitrarily revoked where certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon certificate. A. C. Nelson Enterprises, Inc. v. Cook ------ 184
2. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh ---------- 385
3. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh 385
4. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair and equitable result under all circumstances. Martin v. Martin ---------- 393
5. Actions in equity on appeal to Supreme Court are triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict it will consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Martin v. Martin ---------- 393
6. Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under rules of law. Garwood v. Drake University ---------- 605
7. When action in equity appealed, duty of Supreme Court to try issues de novo and reach independent conclusion without reference to findings of district court. Rambo v. Galley ---------- 692

8. Where in action in equity, oral evidence in respect to material issue so conflicting that it cannot be reconciled, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version of facts rather than opposite. Rambo v. Galley ---------- 692

Estates.

1. Law favors early vesting of estates; in construing will containing devise of life estate and devise of remainder, inference of vested remainder stronger than inference of contingent remainder if meaning obscure in this respect. Rudy v. Wagner ---------- 508
2. Words "in the event of death," "in case of death," or "at his death" do not have effect of postponing vesting of estate in remainder to time of death of life tenant. Rudy v. Wagner ---------- 508
3. In absence of provisions indicating contrary, remainder granted in will to children of life tenant becomes vested at once in children, defeasibly, despite presence of limitation over in event of death of life tenant leaving no child. Rudy v. Wagner ---------- 508
4. Devise to children as class of remainder over after life estate vests title to estate in remainder in such of them as are living at time of death of testator and in those born during continuance of life estate from moment of their birth; estate in remainder when once vested does not lapse by reason of death of beneficiary prior to expiration of life estate unless will so provides. Rudy v. Wagner ---------- 508
5. Where language conveying remainder interest to class does not provide for defeasance in case of death of one of class during continuance of life estate, vested interest of such member of class does not lapse but descends to his heirs. Rudy v. Wagner -- 508
6. Under specified testamentary language, devise of remainder over after life estate was to children of life tenant as a class; estate in remainder vested in each of them as they were born during continuance of life estate, and did not lapse as to child who predeceased life tenant; remainder defeasible only in event of death of life tenant, leaving no child or children. Rudy v. Wagner ---------- 508

Estoppel.

1. Naked oral promise to pay debt will not, in absence

of fraud or specific agreement not to take advantage of statute of limitations, estop defendant or debtor to plead statute of limitations. Degmetich v. Beranek ---------- 659
2. A variable in issue preclusion is identity of issues in the two trials. Drainage Dist. No. 10 v. Canaday 701
3. Statutory provisions may cut across issue preclusion at common law. Lost Creek Drainage Dist. v. Elsam ---------- 705

Evidence.

1. Burden of proof of exceptions within ambit of Depressant and Stimulant Drugs Act on party attempting to bring himself within exceptions. State v. Minor 23
2. Wife's incompetency in criminal proceedings against her husband limited to testimonial utterances; she is competent to supply information for presentence report. State v. Minor---------- 23
3. Sentencing judge has broad discretion in source and type of evidence he may use to assist him in determining kind and extent of punishment to be imposed within limits fixed by statute; he may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of defendant. State v. Minor ---------- 23
4. Modern concepts individualizing punishment have made it necessary that sentencing judge not be denied opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to trial. State v. Minor 23
5. Parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 61
6. Claim liquidated if evidence furnishes data which, if believed, makes it possible to compute amount, without reliance upon opinion or discretion. Abbott v. Abbott ---------- 61
7. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Rose ---------- 84
8. Not burden of State to establish no discrimination in jury selection until at least prima facie case of discrimination established. State v. Casados ------ 91
9. As general rule, evidence of other crimes than

that with which accused charged not admissible in criminal prosecution. State v. Casados 91
10. Evidence of other crimes, similar to that charged, relevant and admissible when tends to prove particular criminal intent necessary to constitute crime charged. State v. Casados 91
11. Proof of another distinct substantive crime not admissible in criminal prosecution unless some legal connection between the two upon which it can be said one tends to establish the other or some essential fact in issue. State v. Casados 91
12. Supreme Court, in criminal action, will not interfere with verdict of guilty based upon conflicting evidence unless so lacking in probative force that, as matter of law, insufficient to support finding of guilt beyond reasonable doubt. State v. Monroe .. 100
13. Where actual verbatim record of proceedings on taking plea of guilty lost, reasonably accurate account of what took place established by other evidence not "silent record" within proscription of Boykin v. Alabama. State v. Hall 130
14. When, in opinion of Supreme Court, sentence excessive or not warranted by evidence, statute contemplates correction on appeal. State v. Etchison 134
15. In post conviction cases, rule clear that petitioner has burden of establishing basis for relief. State v. Fusby 139
State v. Howell 687
16. Evidence that property taken without right or leave and abandoned at distant place will sustain finding of intent to keep wrongfully. State v. Blotzer 143
17. In every case, before evidence on an issue submitted to jury, preliminary question for court, not whether literally no evidence, but whether any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Baker v. Daly 156
18. Mere scintilla of evidence not enough to require submission of an issue to jury. Baker v. Daly 156
19. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly 156
20. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of constructive contract. Abel Constr. Co. v. School

Dist. of Seward ---------- 166
21. Apparent authority is power to affect legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with other's manifestations to such third persons. Abel Constr. Co. v. School Dist. of Seward ---------- 166
22. Conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if pretrial identification procedures so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Reed ---------- 195
23. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ------ 200
24. Conviction may rest on uncorroborated testimony of accomplice. State v. Oglesby ---------- 211
25. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
26. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
27. Photographs admissible in evidence if shown true and correct representations of places or subjects purport to represent at times pertinent to inquiry; admission of photographs largely within discretion of trial court and unless abuse of discretion shown, error not predicated thereon. State v. Radcliff -- 236
28. On appeal to district court from order of Director of Motor Vehicles revoking driver's license for point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at evidentiary hearing and necessary foundational facts must support validity of order of revocation. State v. Lessert ---------- 243
29. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to

support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
Borowski v. Armco Steel Corp. ---------- 654
30. Test usually employed in this state to determine whether relationship of master and servant exists whether alleged employer has control of workman and of details, mode, and manner of doing work. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
31. Whether accident arises out of and in course of employment must be determined by facts of each case; no fixed formula by which question may be resolved. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
32. In determining whether risk arises out of employment, test to be applied to any act or conduct of employee which does not constitute direct performance of his work whether it is reasonably incident thereto or so substantial a deviation as to constitute break in employment and to create formidable independent hazard. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
33. Burden on one who attacks statute valid on face to prove facts to establish its invalidity. City of Parkview v. City of Grand Island ---------- 267
34. Jury verdict based upon conflicting evidence not set aside unless so clearly wrong as to induce belief on part of Supreme Court that must have been found through passion, prejudice, mistake, or some means not apparent in record. Wright v. Haffke ---------- 270
Moats v. Lienemann ---------- 452
35. In reviewing evidence where jury returned verdict for defendant, defendant must have benefit of any and all reasonable inferences deducible from proof. Wright v. Haffke ---------- 270
36. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. Wright v. Haffke ---------- 270
37. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke ---------- 270
38. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions.

Demont v. Mattson ---------- 277
39. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ------ 277
40. More than one act of negligence may in combination amount to gross negligence under guest statute; several acts should be weighed as whole. Demont v. Mattson ---------- 277
41. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson -------- 277
42. Before contributory negligence of guest passenger presents jury question, must be evidence that it proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
43. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that personal injury sustained by employee, arising out of and in course of his employment. Breed v. Interstate Glass Co. ---------- 284
44. Problem concerning admissibility of evidence of other offenses is special aspect of broad general problem of relevancy; generally test of admissibility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or an essential element thereof. State v. Meadows ------ 287
45. Whenever point reached at which trier of fact being told that which it is entirely equipped to determine without witness' aid, testimony superfluous. State v. Thunder Hawk ---------- 294
46. Supreme Court may reduce sentence when in its opinion sentence excessive, and is under duty to render such sentence against accused as in its opinion may be warranted by evidence. State v. Thunder Hawk ---------- 294
47. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
48. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality

bad, but such attack must be addressed directly to his reputation for truth and veracity. State v. Bittner ---------- 298

49. When chastity not an issue, evidence of general reputation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298

50. Discretion of court respecting custody and support of minor children subject to review; determination of trial court, however, ordinarily not disturbed unless has been clear abuse of discretion or clearly against weight of evidence. Oberg v. Oberg ------ 316

51. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell -- 323

52. Under law of Nebraska, accused charged with rape cannot be convicted solely on testimony of prosecutrix. State v. Ferguson ---------- 330

53. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330

54. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson ---- 330

55. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff and effect of denial to put burden on plaintiff to establish by evidence matter denied. First Nat. Bank of Bellevue v. Rose ---------- 362

56. Where answer to petition consists of general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition; for such purposes, no other allegations in answer necessary. First Nat. Bank of Bellevue v. Rose ---------- 362

57. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances sur-

rounding act and from defendant's conduct subsequent thereto. State v. Claire ---------- 373

58. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Ryan ---------- 381

59. Convictions based on eyewitness identification at trial following pretrial indentification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Nero 383

60. True consideration for deed of conveyance of real estate may be shown by parol evidence, although deed recites consideration. Weiner v. Hroch ----- 389

61. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389

62. Not province of Supreme Court in reviewing record in action at law to resolve conflicts in or weigh evidence. Weiner v. Hroch ---------- 389
Melcher v. Boesch Motor Co. ---------- 522

63. Actions in equity on appeal to Supreme Court are triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict it will consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Martin v. Martin ---------- 393

64. While particular facts inadmissible in evidence upon direct examination for purpose of sustaining or overthrowing character, doctrine does not extend to cross-examination. State v. Newte ---------- 412

65. Plaintiff must not only show in breach of contract case his right of recovery, but elements and facts which compose measure of his recovery, and not leave jury to rove without guide or compass through limitless fields of conjecture and speculation. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435

66. Duty of district court to refrain from submitting to jury issue of damages when evidence such that it cannot determine such issue except by indulging in speculation and conjecture. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
67. In proceeding in error, review solely upon record made by tribunal whose action being reviewed; no new facts or evidence can enter into consideration of court. Harnett v. City of Omaha ---------- 449
68. Where appears in error proceeding that administrative agency acted within its jurisdiction and is some competent evidence to sustain its findings and order, order of administrative agency will be affirmed. Harnett v. City of Omaha ---------- 449
69. In every case, before evidence submitted to jury, there is preliminary question for court to decide, when properly raised, not whether is literally no evidence, but whether is any upon which jury can properly proceed to find verdict for party producing it, upon whom burden of proof imposed. Moats v. Lienemann ---------- 452
Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
70. Motion for directed verdict or for judgment notwithstanding verdict must be treated as admission of truth of all material and relevant evidence submitted on behalf of party against whom motion directed; such party entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be deduced from evidence. Moats v. Lienemann ---------- 452
71. In determining question of whether evidence sufficient to submit issues of negligence to jury, a party is entitled to have all conflicts in evidence resolved in his favor and benefit of every reasonable inference that may be deduced from evidence; if reasonable minds might draw different conclusions from set of facts thus resolved in favor of a party, issues of negligence for jury. Moats v. Lienemann -------- 452
72. Hypothetical questions propounded to expert, if so framed as to fairly and reasonably reflect facts proved by any of witnesses in case, will be sufficient, provided subject one proper for expert testimony. Moats v. Lienemann ---------- 452
73. Where insurer's defense based upon exclusionary clause in policy, burden on insurer to prove facts which bring it within exclusion. Robinson v. State

Farm Mut. Auto. Ins. Co. ---------- 470
74. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict; every controverted fact must be resolved in his favor and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Department of Banking v. Colburn ---------- 500
75. Verdict of jury based upon conflicting evidence not set aside unless clearly wrong. Department of Banking v. Colburn ---------- 500
Melcher v. Boesch Motor Co. ---------- 522
76. Burden of proof on party relying on breach of warranty to show performance of conditions as to which right to assert warranty depends, or waiver thereof, or excuse for nonperformance. Melcher v. Boesch Motor Co. ---------- 522
77. In testing sufficiency of evidence to support judgment, evidence must be considered in light most favorable to successful party. Melcher v. Boesch Motor Co. ---------- 522
78. Damages for future loss of earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence as reasonably certain and proximately resulting from pleaded injury. Lake v. Southwick ---------- 533
79. In testing sufficiency of evidence to support verdict, must be considered in light most favorable to successful party; every controverted fact must be resolved in his favor and he should have benefit of every inference that can be reasonably drawn therefrom. Lake v. Southwick ---------- 533
Dahl v. Robinson ---------- 547
80. On appellate review of workmen's compensation case in Supreme Court, cause not considered de novo unless findings of fact not supported by evidence as disclosed by record. Swartz v. Hess, Inc. ---------- 542
81. Opinions of experts not binding on trier of facts. Swartz v. Hess, Inc. ---------- 542
82. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake or clear that jury disregarded evidence or controlling rules of law. Dahl v. Robinson ---------- 547
83. In determining sufficiency of evidence to sustain

verdict, must be considered most favorably to successful party and all conflicts resolved in his favor. Ristine v. Geigy Agricultural Chemicals ---------- 550

84. Testimony by plaintiff as to statements of defendants' agent made to third party and related to plaintiff by third party admissible to show statements were related to plaintiff and that he relied on them. Ristine v. Geigy Agricultural Chemicals _ 550

85. While expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon precise or ultimate fact in issue before jury, which must be determined by it. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

86. Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence not sufficient to sustain verdict unless circumstances proved by evidence of such nature and so related to each other that conclusion reached by jury only one that can fairly and reasonably be drawn therefrom. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

87. Conjecture, speculation, or choice of possibilities not proof; must be something more which will lead reasoning mind to one conclusion rather than another. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

88. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

89. Negligence question of fact and may be proved by circumstantial evidence and physical facts; however, law requires that facts and circumstances proved, together with inferences that may properly be drawn therefrom, indicate with reasonable certainty negligent act charged. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

90. Discretion of lower court with respect to awarding custody of minor children subject to review, but determination of lower court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Scripter v. Scripter ---------- 576

91. Actions in equity on appeal to Supreme Court triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in de-

termining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Scripter v. Scripter -- 576

92. Sentence dictated by inordinate emotion suspect; is only by coincidence that it finds support in evidence. State v. West ---------- 579

93. In considering application for permit as contract carrier, Railway Commission required to weigh special needs of shippers desiring contract carrier service; effect on protesting carriers of grant of application and effect on shippers of denial factors to be weighed in determining if grant of application consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. - 584

94. Burden upon applicant for permit as contract carrier to show that proposed service specialized and fits need of proposed contracting shippers, that applicant fit, willing, and able to perform service, and that proposed operation will be consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

95. Where transportation of specified commodities can be performed as well by common carriers as by contract carriers, need for contract carriers not established. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

96. If competent proof made by applicant, showing proposed service specialized and needed, and protested by common carriers showing willingness and ability to perform it, applicant must then establish he is better equipped and qualified to meet special needs of proposed contracting shippers than protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

97. Adequacy of existing services to perform normal needs of proposed contracting shippers not conclusive where new service better designed to fit special requirements of proposed contracting shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

98. Where is evidence to sustain factors for and against issuance of permit to contract carrier, required to be considered by Railway Commission by cited statutes, determination of public interest for commission and not courts. Wells Fargo Armored Service

Corp. v. Bankers Dispatch Corp. ---------- 584
99. Past unlawful actions do not necessarily bar on grounds of unfitness future grants of operating authority if public interest will best be served by approval. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584
100. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Koob v. Long ---------- 640
101. Claimant of substantial damages must furnish appropriate data to enable trier of fact to find amount of damages with reasonable certainty if evidence of damages or amount thereof susceptible of definite proof; damages may not be established by conjecture, speculation, or doubtful proof. Masten v. Campbell Manuf. Co. ---------- 646
102. Not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence, unless so lacking in probative force as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Embrey ---------- 649
103. Admission of executor or administrator not receivable against him as party in his personal capacity. Degmetich v. Beranek ---------- 659
104. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659
105. To remove bar of statute, debtor must unqualifiedly acknowledge existing liability. Degmetich v. Beranek ---------- 659
106. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Rowedder v. Rose ---------- 664
107. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to atten-

tion of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---- 673

108. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion shown. Healey v. Hartman ---- 682

109. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---- 682

110. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show he is acting in good faith and appeal has merit, he has failed to sustain required burden of proof. State v. Howell ---- 687

111. Failure to move for suppression of evidence seized unlawfully waives objection. State v. Howell ---- 687

112. When evidence of guilt clear and exclusion of erroneous evidence obviously would not have resulted in different verdict, admission of such evidence harmless error. State v. Howell ---- 687

113. Where in action in equity, oral evidence in respect to material issues so conflicting that it cannot be reconciled, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version of facts rather than opposite. Rambo v. Galley ---- 692

114. In action for breach of contract, plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable court, with reasonable degree of certainty and exactness, to estimate actual damages, and if he fails to do this he can recover only nominal sum. Rambo v. Galley ---- 692

115. When, as required by statute, district engineer has examined land and made his report to board of supervisors of drainage district which approved report, report furnishes prima facie evidence of classification and benefits, and in absence of fraud, such evidence sufficient to sustain decision of board unless decision overcome by competent evidence to contrary. Drainage Dist. No. 10 v. Canaday ---- 701

116. In quo warranto proceeding, ordinarily burden of

proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
117. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
118. Generally, in quo warranto proceeding, when challenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ---- 710
119. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
120. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
121. Information supplied to judicial officer issuing arrest warrant on sworn complaint may be supplemented by additional information which arresting officers themselves have or have acquired before arrest and which is corroborative of complicity of arrestee in crime. State v. Rice ---------- 728
122. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ---- 728
123. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728
124. Defendants challenging joint trial must affirmatively demonstrate that joint trial has prejudiced their individual rights. State v. Rice ---------- 728
125. Irrelevant and immaterial evidence erroneously admitted not necessarily prejudicial. State v. Rice -- 728
126. Burden of proof upon person asserting undue influence to prove by preponderance of evidence: (1) That grantor, testator, or donor was person who would be subject to such influence; (2) that was opportunity to exercise such influence; (3) that was disposition to exercise such influence; and (4) that result was effect of such influence. Gaeth v. New-

man ---------- 756
127. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving confidential relationship existed between parties rests on one attacking gift. Gaeth v. Newman ---------- 756
128. Where facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman ----- 756
129. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Gaeth v. Newman ---------- 756
130. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
131. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman 756
132. In order to establish undue influence invalidating deed, must be proof that circumstances of execution of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman ---------- 756
133. Public policy forbids that deeds and mortgages of real estate, duly authenticated in mode pointed out by statute, should be set aside except upon clear and convincing proof that certificate of acknowledgment false. Gaeth v. Newman ---------- 756
134. In action for divorce, if evidence principally oral and in irreconcilable conflict and determination of issues depends to reasonable extent upon reliability of respective witnesses, conclusion of trial court given great weight, and will not be disturbed on appeal unless good cause shown. Sees v. Sees -- 769
135. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland -------- 804
136. Ordinarily, party entitled to benefit of testimony

of other witnesses in contradiction of his own, wherever his own not of character of judicial admission, and concerns only some evidential or constituent circumstance of his case; this is especially so as to circumstances of accident or similar event, because in such case party's testimony especially subject to inexactness of observation and memory. Sacco v. Gau ---------- 808

137. Where party testifies clearly and unequivocally to fact which is within his own knowledge, such testimony may be considered judicial admission; rule has particular application where party so testifying made no effort to retract, qualify, or otherwise explain positive force of his own evidence. Sacco v. Gau ---------- 808

138. Admission in rebuttal of testimony which should have been offered in chief rests in sound discretion of court. Sacco v. Gau ---------- 808

Executors and Administrators.

1. Admission of executor or administrator not receivable against him as party in his personal capacity. Degmetich v. Beranek ---------- 659
2. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659

Extradition.

1. Immaterial that complaint did not specifically allege commission of acts in this state intentionally resulting in crime in Kansas when requisition makes such facts clear. State of Kansas v. Holeb ------ 319
2. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb --------- 319
3. One who commits act in one state intentionally resulting in crime in another state may be extradited, and statement in Governor's warrant that accused is fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded

as surplusage. State of Kansas v. Holeb 319
4. Illegality of prisoner's custody prior to issuance of rendition warrant from sister state does not render warrant void and unenforceable. Bell v. Janing .. 690

Fees.

1. Reasonable attorney's fee to be determined by nature of case, amount involved in controversy, results obtained, and services actually performed therein, including length of time necessarily spent in case, care and diligence exhibited, and character and standing of attorney. Junker v. Junker 555
2. In determining fairness of award for attorney's fee, consideration may be given to provisions of Nebraska State Bar Association Minimum Fee Advisory Schedule. Junker v. Junker 555
3. While trial courts and appellate courts equally regarded as experts on value of legal services, trial court ordinarily has better opportunity for practically appraising situation, and appellate court will interfere only to correct patent injustice where allowance clearly excessive or insufficient. Junker v. Junker 555

Forcible Entry and Detainer.

1. Tenant possesses right to a demand for payment of rent and reasonable opportunity to pay; must be neglect or refusal on his part before landlord may claim forfeiture of lease or judgment of ouster for nonpayment of rent. Marine Equipment & Supply Co. v. Welsh 385
2. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh 385
3. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh 385

Fraud.

1. Parol evidence rule does not prevent reception or

consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 61
2. Disclaimer clause in bargain relevant to issue whether claimant in fact relied on false representation disclaimed in clause. Abbott v. Abbott ---------- 61

Frauds, Statute of.
1. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
2. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
3. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ---------- 200
4. Naked oral promise to pay debt will not, in absence of fraud or specific agreement not to take advantage of statute of limitations, estop defendant or debtor to plead statute of limitations. Degmetich v. Beranek ---------- 659

Gifts.
1. Charitable gift not permitted to fail because of any mistake or ambiguity in describing intended beneficiary or expressing its purpose if from language of bequest, when construed in light of all facts, intent of donor reasonably apparent. Garwood v. Drake University ---------- 605
2. Burden of proof upon person asserting undue influence to prove by preponderance of evidence: (1) That grantor, testator, or donor was person who would be subject to such influence; (2) that was opportunity to exercise such influence; (3) that was disposition to exercise such influence; and (4) that result was effect of such influence. Gaeth v. Newman ---------- 756
3. Affection, confidence, and gratitude of parent to child which inspires gift is natural and lawful influence and will not render it voidable unless such

influence has been so used as to confuse judgment and control will of donor. Gaeth v. Newman ---- 756
4. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving confidential relationship existed between parties rests on one attacking gift. Gaeth v. Newman ---------- 756
5. Where facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman ---------- 756
6. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman -- 756
7. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
8. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman - 756
9. In order to establish undue influence invalidating deed, must be proof that circumstances of execution of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman ---------- 756

Governor.

Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State ---------- 335

Guilty Plea.

1. Under circumstances in this case, where plea of guilty induced in part by misunderstanding as to recommendation county attorney would make at sentencing hearing, sentence vacated and cause re-

manded for resentencing. State v. Kimes ---------- 85
2. Valid plea of guilty in district court cures any defect may have occurred in proceedings before examining magistrate. State v. Birdwell ---------- 116
3. Standard for determining validity of guilty plea whether or not it represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Hall ---------- 130
State v. Simmons ---------- 365
4. Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130
5. When counsel has advised defendant to plead guilty, defendant who heeded such advice may not subsequently attack voluntariness of guilty plea so long as counsel's advice within range of competence demanded of attorneys in criminal cases. State v. Hall 130
6. That guilty plea must be intelligently made, not a requirement that all advice offered by defendant's lawyer withstand retrospective examination in post conviction hearing. State v. Hall ---------- 130
7. Where actual verbatim record of proceedings on taking plea of guilty lost, reasonably accurate account of what took place established by other evidence not "silent record" within proscription of Boykin v. Alabama. State v. Hall ---------- 130
8. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. Simmons ---------- 365
9. Plea of guilty permits finding conforming to allegations of complaint. Melanson v. State ---------- 446

Habeas Corpus.

1. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its welfare. Cain v. Adams ---------- 152
2. In habeas corpus proceeding to determine custody of child, prime consideration is welfare of child. Loveall v. Loveall ---------- 457

Hearings.

Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in

such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---------- 105

Highways.

1. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640
2. No person shall turn vehicle from direct course on highway unless such movement can be made with reasonable safety, and then only after giving clearly audible signal by sounding horn if any pedestrian may be affected by such movement. Koob v. Long 640

Homicide.

1. Sentence of not less than 4 nor more than 7 years for manslaughter not excessive. State v. Mathews 251
2. Person who has care, custody, or control of child and causes death of child by willfully or negligently causing or permitting life of child to be endangered guilty of manslaughter. State v. Crawford ---------- 378
3. Parent who negligently or willfully fails to obtain medical aid for child, thereby causing his death, guilty of manslaughter. State v. Crawford ---------- 378
4. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ---------- 728
5. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728

Husband and Wife.

1. Wife's incompetency in criminal proceedings against her husband limited to testimonial utterances; she is competent to supply information for presentence report. State v. Minor ---------- 23
2. Term family as used in cited statute includes hus-

band who is residing in same household with other members. Nichol v. Clema ---------- 74
3. Medical services furnished husband individually are necessaries within meaning of cited statute for which wife may be liable. Nichol v. Clema -------- 74
4. Each case of what are necessaries and who is included within term family as provided in cited statute must be determined on its own facts. Nichol v. Clema ---------- 74

Improvements.
1. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
2. Burden of establishing ownership of compensable interest in "improvements" on school land leases on lessee; burden may be satisfied by proof of purchase, or proof that lessee personally placed improvements on land, or proof that they were acquired by gift. State v. Bush ---------- 824
3. Presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in tenant nor satisfy burden of proving ownership. State v. Bush ---------- 824
4. Fact of ownership of improvements does not establish right to receive compensation nor determine any valuation of such improvements. State v. Bush ---- 824
5. Fencing by tenants on school lands does not require approval from Board of Educational Lands and Funds. State v. Bush ---------- 824
6. In event of sale of school lands to third person, tenant has right to compensation resulting from "improvements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Infants.
1. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its welfare. Cain v. Adams ---------- 152
2. In determining whether to accept or reject upset bid,

court must elect between two conflicting duties; ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

3. Order of juvenile court regarding custody of children not disturbed unless clear abuse of discretion or decision against weight of evidence. Anderson v. Doeschot ---------- 444

4. Neglected child is child under 18 years of age who is abandoned by his parents, who lacks proper parental care by reason of fault or habits of parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for health, morals, or well-being of such child. Healey v. Johnson ---------- 677
Healey v. Hartman ---------- 682

5. Child custody statutes of Nebraska to be liberally construed to accomplish purposes of serving best interests of children involved. Healey v. Johnson ---- 677

6. In cases involving child custody determinations in juvenile court and other courts, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown or decision against weight of evidence. Healey v. Johnson ---------- 677

7. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion shown. Healey v. Hartman ---------- 682

8. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---------- 682

Injunction.

Injunctive relief discretionary remedy dependent upon circumstances of case. Peters v. Langrehr ---------- 480

Instructions.

1. Instruction that jury to make no inferences from

fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Johnson ---- 151
2. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
3. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke ---------- 270
4. Instructions to jury considered as whole; when thus considered, if law correctly stated, case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Wright v. Haffke ---------- 270
5. Instructions must be considered and construed together. Demont v. Mattson ---------- 277
6. Ordinarily, uncorroborated testimony of accomplice who has been guilty of conscious falsehood may sustain conviction if proper cautionary instruction given. State v. Bittner ---------- 298
7. Instruction that criminal negligence or culpable neglect not slight breach of duty but gross failure to do what is required not prejudicially erroneous. State v. Crawford ---------- 378
8. Instructions must be construed together and isolated language, taken out of context, not sufficient to support challenge of error if whole instruction or all instructions not misleading or erroneous. Wisnieski v. Harms ---------- 721
9. Related instructions must be read and construed as whole and if when so read and construed they correctly state the law there is no error. State v. Rice 728
10. Instructions must be confined to issues supported by evidence. Sacco v. Gau ---------- 808
11. Instructions given to jury must be construed together, and if when considered as whole they properly state law, that is sufficient. Sacco v. Gau ---- 808

Insurance.

1. In absence of some contractual provision to contrary, risk of loss or damage by windstorm, fire, etc., to new building in course of construction normally on builder. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308

2. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. 308
3. Owner who contracts to procure insurance to cover contractor and fails to do so or who procures such insurance and fails to have contractor named as an insured becomes insurer of contractor. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ------ 308
4. Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
5. Terms and provisions which control in construction of coverage afforded by temporary insurance "binder" those contained in ordinary form of policy usually issued by company at that time upon similar risks. Robinson v. State Farm Mut. Auto. Ins. Co. ------ 470
6. Where insurer's defense based upon exclusionary clause in policy, burden on insurer to prove facts which bring it within exclusion. Robinson v. State Farm Mut. Auto. Ins. Co. ---------- 470
7. Insurance policy insuring against all risks of direct physical loss covers damage caused by failure of boom clutch on lifting crane unless otherwise excluded in policy. Peter Kiewit Sons' Co. v. Hartford Fire Ins. Co. ---------- 553
8. Insurance agent who solicits application for insurance is, in controversy arising between insured and company issuing policy, regarded as representing company and not insured. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
9. Insurance agent who with authority receives and receipts for money for renewal of insurance policy deemed to all intents and purposes agent of company. Squires v. Implement Dealers Mut. Ins. Co. 590
10. Erroneous statement by insurer to insured that insurance policy has lapsed for alleged nonpayment of premium not legal equivalent of notice of election to cancel under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
11. Where insured because of errors in billing by agent of insurance company pays only that portion of renewal premium set forth in billing instead of entire premium, renewal policy not void but voidable at election of company under terms of policy.

Squires v. Implement Dealers Mut. Ins. Co. ------- 590
12. Section 44-501, R. R. S. 1943, directly conflicts with section 44-380, R. R. S. 1943. Insurance Co. of North America v. County of Hall ---------- 609
13. Section 44-501, R. R. S. 1943, as amended and reenacted by 1951 Legislature, provides that fire insurance policy shall conform as to provisions, agreements, and conditions with 1943 Standard Fire Insurance Policy of New York, and declares that no other or different provision, agreement, or clause shall be made part of such fire insurance policy. Insurance Co. of North America v. County of Hall _ 609
14. Under section 44-501, R. R. S. 1943, as amended in 1951, an insured's recovery on fire insurance policy limited by provisions of policy as written in conformity with 1943 Standard Fire Insurance Policy of New York. Insurance Co. of North America v. County of Hall ---------- 609
15. Obligation to defend suit for insured should be determined on basis of whether petition filed against him attempts to allege liability within terms of policy. Frazier, Inc. v. 20th Century Builders, Inc. 618

Intent.

1. Evidence of other crimes, similar to that charged, relevant and admissible when tends to prove particular criminal intent necessary to constitute crime charged. State v. Casados ---------- 91
2. Evidence that property taken without right or leave and abandoned at distant place will sustain finding of intent to keep wrongfully. State v. Blotzer ---- 143
3. Participation in criminal intent may be inferred from presence, companionship, and conduct. State v. Claire ---------- 373
4. If intent of aider different from that of perpetrator, aider's guilt measured by intent that actuated him. State v. Rice ---------- 728
5. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ----- 728
6. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728

7. Interpretation given contract by parties themselves while engaged in performance of it is one of best indications of true intent of contract, and ordinarily, such construction of contract should be enforced. Ranchland Auto, Inc. v. Cleveland ---------- 804
8. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland ---------- 804

Interest.

1. Where amount of claim liquidated, compensation in form of prejudgment interest allowed as matter of right. Abbott v. Abbott ---------- 61
2. Claim liquidated if evidence furnishes data which, if believed, makes it possible to compute amount, without reliance upon opinion or discretion. Abbott v. Abbott ---------- 61
3. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue _ 354
4. By statute (1) on money due on instrument in writing or on settlement of account from day balance agreed upon, interest allowed; and (2) unsettled accounts bear interest after 6 months from date of last item. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
5. By statute, party may recover prejudgment interest and an attorney's fee on claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented claim 90 days prior to commencement of suit; compliance with condition mandatory. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669

Intoxicating Liquors.

1. In workmen's compensation case, burden of proof on defense of intoxication on employer. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
2. Power of a state to absolutely prohibit sale of in-

toxicating liquors includes power to prescribe conditions under which it may be sold. Major Liquors, Inc. v. City of Omaha ---------- 628
3. A state may protect its people against evils incident to use of intoxicants, and may exercise large discretion as to means employed. Major Liquors, Inc. v. City of Omaha ---------- 628
4. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628
5. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha --- 628

Joint Tenancy.

Property owned in joint tenancy passes by reason of nature of title to surviving joint tenant upon death of other and does not pass by virtue of provisions of will of first joint tenant to die. Sheldon v. Watkins 599

Judgments.

1. Where amount of claim liquidated, compensation in form of prejudgment interest allowed as matter of right. Abbott v. Abbott ---------- 61
2. Under rule of res judicata, conclusiveness of prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in final judgment, whether raised or not. State v. Lessert ---------- 243
3. In absence of judgment or order finally disposing of case, Supreme Court has no authority nor jurisdiction to act, and in absence of such judgment or order appeal dismissed. Wulf v. Farm Bureau Ins. Co. 258
4. Indispensable parties to suit those who have such interest in controversy that court cannot render judgment without affecting their interest. Ohmart v. Dennis ---------- 260
5. Preclusive effect of administrative decision depends upon many factors. Ohmart v. Dennis ---------- 260
6. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell ---- 323

7. Judgment of trial court fixing amount of alimony not disturbed on appeal unless good cause shown. Martin v. Martin ---------- 393
8. Conclusiveness of prior judgment precluding subsequent litigation of same cause of action between same parties much broader in its application than determination of questions actually involved in prior action; conclusiveness of judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in final judgment, whether formally raised or not. State ex rel. Southeast Rural Fire P. Dist. v. Grossman ---- 424
9. Ordinarily, effect given to prior judgment of another state determining custody of child as matter of comity unless change in circumstances requires different result. Loveall v. Loveall ---------- 457
10. Ordinarily, action may not be maintained as class action by plaintiff on behalf of himself and others unless he has power as member of class to satisfy judgment on behalf of all members of class. Hansen v. County of Lincoln ---------- 461
11. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln ---------- 461
12. In testing sufficiency of evidence to support judgment, evidence must be considered in light most favorable to successful party. Melcher v. Boesch Motor Co. ---------- 522
13. Purpose of summary judgment proceeding to pierce allegations of pleadings and show conclusively that controlling facts otherwise than alleged and that moving party entitled to judgment as matter of law. Frazier, Inc. v. 20th Century Builders, Inc. -------- 618
14. Where party has sustained burden and expense of trial and has succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless there is prejudicial error in proceedings by which it was secured. Koob v. Long ------ 640
15. Fact alone that answer filed 10 days after answer day without leave of court not sufficient ground for thereafter entering default judgment against defendant. Vacanti & Randazzo Constr. Co. v. H.I.E. Food Products, Inc. ---------- 680

16. Where notice of appeal not filed within 1 month from entry of judgment or final order appealed from as required by cited statute, Supreme Court obtains no jurisdiction to hear appeal and appeal must be dismissed. State v. Howell ---------- 687
17. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Johnson v. Roueche ---------- 716
18. No judgment shall be reversed for error that does not affect substantial rights of adverse party. Hydrotex v. Putnum---------- 727
19. Where there are multiple defendants and judgment entered dismissing action as to one or more, but not all, defendants, judgment is final and appealable order. Green v. Village of Terrytown ---------- 840

Jurisdiction.

Appeal of post conviction proceeding from court inferior in jurisdiction to district court may only be taken to district court. State v. Williams ---------- 802

Jury.

1. Nebraska system of selecting jurors by use of voter registration lists constitutionally permissible. State v. Casados ---------- 91
2. Defendant in criminal case not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors drawn. State v. Casados -- 91
3. Not burden of State to establish no discrimination in jury selection until at least prima facie case of discrimination established. State v. Casados ------ 91
4. In every case, before evidence on an issue submitted to jury, preliminary question for court, not whether literally no evidence, but whether any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Baker v. Daly ---------- 156
5. Mere scintilla of evidence not enough to require submission of an issue to jury. Baker v. Daly ------ 156
6. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly ---------- 156
7. Questions of credibility ordinarily for jury to determine and not for court. State v. Rice ---------- 728

Landlord and Tenant.

1. Tenant possesses right to a demand for payment of rent and reasonable opportunity to pay; must be neglect or refusal on his part before landlord may claim forfeiture of lease or judgment of ouster for nonpayment of rent. Marine Equipment & Supply Co. v. Welsh ---------- 385
2. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh ---------- 385
3. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh ---------- 385
4. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
5. Burden of establishing ownership of compensable interest in "improvements" on school land leases on lessee; burden may be satisfied by proof of purchase, or proof that lessee personally placed improvements on land, or proof that they were acquired by gift. State v. Bush ---------- 824
6. Presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in tenant nor satisfy burden of proving ownership. State v. Bush ---------- 824
7. Fact of ownership of improvements does not establish right to receive compensation nor determine any valuation of such improvements. State v. Bush ---- 824
8. In absence of agreement, tenant on school lands has compensable interest in crops, annual or perennial, growing on such lands on date of termination of his lease. State v. Bush ---------- 824
9. In event of sale of school lands to third person, tenant has right to compensation resulting from "im-

provements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Larceny.

1. Stealing defined as taking without right or leave, with intent to keep wrongfully. State v. Blotzer -- 143
2. Evidence that property taken without right or leave and abandoned at distant place will sustain finding of intent to keep wrongfully. State v. Blotzer ------ 143

Legislature.

1. Legislature has plenary legislative authority limited only by state and federal Constitutions. Dwyer v. Omaha-Douglas Public Building Commission ---- 30
2. Legislative construction of statutory or constitutional provision, although not conclusive on courts, when deliberately made, entitled to great weight. Dwyer v. Omaha-Douglas Public Building Commission ---- 30
3. Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility. Dwyer v. Omaha-Douglas Public Building Commission ---- 30
4. In construing act of Legislature, all reasonable doubts must be resolved in favor of constitutionality. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
6. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335
7. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expendi-

tures will serve public interest. Sandberg v. State 335
8. Nothing more familiar in taxation than imposition of tax upon class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for condition to be remedied. Sandberg v. State ---------- 335
9. Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State ---------- 335
10. Legislature has plenary power and control over school districts, including provision for appointment or election of governing bodies thereof; consequently, it may provide limitations on any authority to be exercised by school board. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
11. Legislature has complete control of actions of school boards; whether or not Legislature acted wisely in premises not matter of judicial determination; courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. School Dist. of Seward Education Assn. v. School Dist. of Seward 772

Lessor and Lessee.

Mere leasing of personal property, without proof of other circumstances, by covenantor to existing competitor of promisee, does not constitute breach of general covenant not to compete. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435

Libel and Slander.

1. Statute of limitations in libel action commences to run upon publication of defamatory matter which forms basis of action. Patterson v. Renstrom ------ 78
2. Absolute privilege attaches to defamatory statements made incident to, and in course of, judicial proceeding if defamatory matter has some relation to proceedings. Sinnett v. Albert ---------- 176
3. Rule of absolute privilege applicable not only to judicial proceedings but to quasi-judicial proceedings as well. Sinnett v. Albert ---------- 176
4. Relevancy of defamatory matter not technical legal relevancy but instead general frame of reference and relationship to subject matter of action. Sinnett v. Albert ---------- 176

5. Absolute privilege to publish false and defamatory matter in complaint made to committee on inquiry of Nebraska State Bar Association regarding alleged misconduct of attorney where defamatory matter related thereto. Sinnett v. Albert ---------- 176

Licenses and Permits.

1. Power to withhold license for good cause as well as standards defining good cause need not be expressly delegated where, by fair implication, in light of statutory purpose, such power implicitly delegated. Bartlett v. State Real Estate Commission 828
2. In absence of mandatory statutory requirements, power vested in officer or board to grant licenses carries with it, expressly or impliedly, power to exercise reasonable discretion in granting or refusing licenses. Bartlett v. State Real Estate Commission ---------- 828
3. Power to refuse license coextensive with power to revoke. Bartlett v. State Real Estate Commission -- 828
4. Where State Real Estate Commission has power to revoke a salesman's license upon specific grounds, it may properly refuse to issue license initially upon same grounds. Bartlett v. State Real Estate Commission ---------- 828

Limitations of Actions.

1. Statute of limitations in libel action commences to run upon publication of defamatory matter which forms basis of action. Patterson v. Renstrom ------ 78
2. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. -- 654
3. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659
4. To remove bar of statute, debtor must unqualifiedly acknowledge existing liability. Degmetich v. Beranek ---------- 659
5. Naked oral promise to pay debt will not, in absence

of fraud or specific agreement not to take advantage of statute of limitations, estop defendant or debtor to plead statute of limitations. Degmetich v. Beranek ---------- 659

Limitations, Statute of.

Order entered denying plea of statute of limitations, after separate hearing on that issue, not final or appealable order. Wulf v. Farm Bureau Ins. Co. - 258

Master and Servant.

1. Test usually employed in this state to determine whether relationship of master and servant exists whether alleged employer has control of workman and of details, mode, and manner of doing work. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
2. In determining whether risk arises out of employment, test to be applied to any act or conduct of employee which does not constitute direct performance of his work whether it is reasonably incident thereto or so substantial a deviation as to constitute break in employment and to create formidable independent hazard. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
3. In tort action based exclusively on alleged negligence of employee or agent, valid release of that employee-agent releases employer or principal from liability, even though release specifically reserves all claims against employer-principal. Dickey v. Meier ---------- 420
4. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. -- 654

Mental Health.

1. Sexual Psychopath Act intended to permit removal of sexual psychopath from society until he is cured or no longer menace to safety of others. State v. King ---------- 563
2. Intent of Sexual Psychopath Act to require confinement until such time as offender not likely to

attack or otherwise inflict injury, loss, pain, or other evil on objects of his uncontrolled and uncontrollable desires. State v. King ---------- 563

Mortgages.

1. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389
2. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to attention of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
3. In appealing from decree of foreclosure which orders sale of land, supersedeas bond should be conditioned as set out in cited statute, and amount of pledge matter of judicial discretion; in appealing from decree of foreclosure which directs payment of money and also orders sale of real estate, court may require supersedeas bond in amount computed as specified in said statute. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673

Motions, Rules, and Orders.

1. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice and hearing before such order. Stauffer v. Weedlun ---------- 105
2. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105
3. Failure of Railway Commission previous to January 1, 1968, to enunciate rule and regulation on tacking cannot be construed to imply right to tack inherent

in certificates heretofore issued unless specifically restricted. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
4. Right to prohibit tacking of regular to irregular route authorities, or irregular to irregular route authorities, policy determination within inherent authority of Railway Commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
5. On appeal from order of Railway Commission administrative or legislative in character, only questions to be determined whether commission acted within scope of its authority and whether order reasonable and not arbitrarily made. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
6. Order entered denying plea of statute of limitations, after separate hearing on that issue, not final or appealable order. Wulf v. Farm Bureau Ins. Co. 258
7. Statutory requirement that Oil and Gas Conservation Commission enter its order within 30 days after hearing directory, not mandatory. Ohmart v. Dennis 260
8. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell _ 323
9. Criminal prosecution cannot be maintained under statute requiring permit be obtained from Department of Environmental Control "as required by it," i.e., department, in absence of rules, regulations, or standards fixing circumstances under which such permit "required." State v. West ---------- 371
10. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Smith -------- 388
11. Motion for directed verdict or for judgment notwithstanding verdict must be treated as admission of truth of all material and relevant evidence submitted on behalf of party against whom motion directed; such party entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be deduced from evidence. Moats v. Lienemann ---------- 452
12. In determining whether motion for judgment not-

withstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict; every controverted fact must be resolved in his favor and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Department of Banking v. Colburn ---------- 500

13. Failure to move for suppression of evidence seized unlawfully waives objection. State v. Howell --- 687

14. Proper manner in which to challenge appropriateness of counterclaim is by motion to strike. The Tilden Bank v. Retzlaff ---------- 834

Motor Vehicles.

1. Issued motor vehicle operator's license gives rise to such legal entitlement as may not be taken away without procedural due process. Stauffer v. Weedlun 105

2. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---------- 105

3. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice and hearing before such order. Stauffer v. Weedlun ------ 105

4. When condition of automobile indicative of criminal offense in plain sight of officer looking at automobile from outside, examination justified and legal. State v. Etchison ---------- 134

5. Failure of pedestrian with right-of-way to see approaching car within limit of danger or to misjudge its speed not ordinarily contributory negligence as matter of law. Baker v. Daly ---------- 156

6. Director of Motor Vehicles acts ministerially in revoking driver's license for point violations under cited statute. State v. Lessert ---------- 243

7. On appeal to district court from order of Director of Motor Vehicles revoking driver's license for point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may

be challenged at evidentiary hearing and necessary foundational facts must support validity of order of revocation. State v. Lessert ---------- 243
8. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ---------- 243
9. Generally negligence, as matter of law, for motorist to drive so fast on highway at night that he cannot stop in time to avoid collision with object within area lighted by his headlights. Fink v. Meister -- 248
10. Exceptions to general rule that motorist who cannot stop his automobile in time to avoid collision with object within range of his vision negligence as matter of law embrace those situations where reasonable minds might differ as to whether motorist exercising due care under particular circumstances. Fink v. Meister ---------- 248
11. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions. Demont v. Mattson ---------- 277
12. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ------ 277
13. More than one act of negligence may in combination amount to gross negligence under guest statute; several acts should be weighed as whole. Demont v. Mattson ---------- 277
14. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson ---------- 277
15. Where head of family owns or maintains car for family use and family member using car with express or implied consent of owner, negligence of family member driver imputed to head of family. Demont v. Mattson ---------- 277
16. Before contributory negligence of guest passenger presents jury question, must be evidence that it

proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
17. Motorist who observes turning signal on automobile preceding him but fails to maintain control over his vehicle sufficient to enable him to avoid collision with automobile when movement indicated made, guilty of contributory negligence as matter of law, more than slight, and sufficient to bar his recovery. Haffke v. Grinnell ---------- 323
18. Motorist under duty to keep proper lookout and watch where he is driving, although he has right-of-way; when in place of relative safety he sees, or in exercise of reasonable care, should have seen, approach of moving vehicle in close proximity, and moves from safe place into path of approaching vehicle and is struck, his conduct constitutes negligence. Van Ostrand v. Beccard ---------- 326
19. Bright sunlight ordinarily condition that does not excuse duty of motorist to look and see approaching vehicles operated without negligence within radius that denotes limit of danger. Van Ostrand v. Beccard ---------- 326
20. Points to be assessed by Director of Motor Vehicles for speeding violation determined by amount by which limit exceeded. Melanson v. State ---------- 446
21. Amount by which limit exceeded not essential element of offense of speeding, but point system statute requires magistrate or judge make such finding; finding of information to be shown on abstract for conviction. Melanson v. State ---------- 446
22. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640
23. No person shall turn vehicle from direct course on highway unless such movement can be made with reasonable safety, and then only after giving clearly audible signal by sounding horn if any pedestrian may be affected by such movement. Koob v. Long 640
24. Left turn across public highway between intersections fraught with danger, and one making such movement required to exercise degree of care commensurate with the danger. Rowedder v. Rose ---- 664
25. When driver of motor vehicle turning across high-

way between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which in plain sight, or in position where cannot see, question for court usually presented. Rowedder v. Rose ---------- 664

26. Driving at speed defined by statute, when such definition sets maximum speed and also includes requirement that such speed be reasonable and proper, having regard for traffic, use of road, condition of road, and requirement not to exceed rate of speed such as to endanger life or limb of any person, not negligence in absence of other evidence indicating fault. Rowedder v. Rose ---------- 664

27. Duty to sound signal warning of approach of motor vehicle depends largely on circumstances of particular case. Rowedder v. Rose ---------- 664

28. Violation of stop light, standing alone, not sufficient to prove gross negligence. Sacco v. Gau -- 808

Municipal Corporations.

1. Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility. Dwyer v. Omaha-Douglas Public Building Commission ------ 30

2. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ----- 30

3. L. B. 1003, 82nd Legislative Session, which enabled cities of metropolitan class and county in which such city located to create public building commission authorized to furnish facilities for joint use of city and county pertains to matter of state concern and not just strictly municipal affair. Dwyer v. Omaha-Douglas Public Building Commission -- 30

4. Tax authorized to be levied by city of metropolitan class under provisions of L. B. 1003, 82nd Legislative Session, not a tax for corporate purposes and is one levied by local authority; does not contravene Article VIII, section 7, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

5. Annexation ordinances may be considered at special

meetings of city council in absence of statutory provision to contrary. Holden v. City of Tecumseh 117
6. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117
7. Agricultural lands, urban or suburban in character, subject to annexation under cited statute. Holden v. City of Tecumseh ---------- 117
8. Location of city streets matter generally within discretion of municipal authorities. Holden v. City of Tecumseh ---------- 117
9. Requirement in cited statute that annexing city have "sewer treatment facilities" with capacity to serve city annexed, intended to insure that residents of annexed city able to receive sewage treatment service from annexing city. City of Parkview v. City of Grand Island ---------- 267
10. City of first class not required to obtain recommendation from planning commission before proceeding with annexation matters. City of Parkview v. City of Grand Island ---------- 267
11. Whether municipal ordinance subject to referendum determined by language of applicable provision for referendum and by facts of each case. Hoover v. Carpenter ---------- 405
12. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha -- 628
13. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
14. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628

Negligence.

1. Failure of pedestrian with right-of-way to see approaching car within limit of danger or to misjudge its speed not ordinarily contributory negligence as matter of law. Baker v. Daly ---------- 156
2. Generally negligence, as matter of law, for motorist to drive so fast on highway at night that he cannot

stop in time to avoid collision with object within area lighted by his headlights. Fink v. Meister -- 248
3. Exceptions to general rule that motorist who cannot stop his automobile in time to avoid collision with object within range of his vision negligence as matter of law embrace those situations where reasonable minds might differ as to whether motorist exercising due care under particular circumstances. Fink v. Meister ---------- 248
4. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions. Demont v. Mattson ---------- 277
5. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ------ 277
6. More than one act of negligence may in combination amount to gross negligence under guest statute; several acts should be weighed as whole. Demont v. Mattson ---------- 277
7. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson - 277
8. Where head of family owns or maintains car for family use and family member using car with express or implied consent of owner, negligence of family member driver imputed to head of family. Demont v. Mattson ---------- 277
9. Before contributory negligence of guest passenger presents jury question, must be evidence that it proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
10. Motorist who observes turning signal on automobile preceding him but fails to maintain control over his vehicle sufficient to enable him to avoid collision with automobile when movement indicated made, guilty of contributory negligence as matter of law, more than slight, and sufficient to bar his recovery. Haffke v. Grinnell ---------- 323
11. Motorist under duty to keep proper lookout and watch where he is driving, although he has right-

of-way; when in place of relative safety he sees, or in exercise of reasonable care, should have seen, approach of moving vehicle in closs proximity, and moves from safe place into path of approaching vehicle and is struck, his conduct constitutes negligence. Van Ostrand v. Beccard ---------- 326

12. Bright sunlight ordinarily condition that does not excuse duty of motorist to look and see approaching vehicles operated without negligence within radius that denotes limit of danger. Van Ostrand v. Beccard ---------- 326

13. Person who has care, custody, or control of child and causes death of child by willfully or negligently causing or permitting life of child to be endangered guilty of manslaughter. State v. Crawford ---------- 378

14. Parent who negligently or willfully fails to obtain medical aid for child, thereby causing his death, guilty of manslaughter. State v. Crawford ------ 378

15. Instruction that criminal negligence or culpable neglect not slight breach of duty but gross failure to do what is required not prejudicially erroneous. State v. Crawford ---------- 378

16. In tort action based exclusively on alleged negligence of employee or agent, valid release of that employee-agent releases employer or principal from liability, even though release specifically reserves all claims against employer-principal. Dickey v. Meier ---------- 420

17. In determining question of whether evidence sufficient to submit issues of negligence to jury, a party is entitled to have all conflicts in evidence resolved in his favor and benefit of every reasonable inference that may be deduced from evidence; if reasonable minds might draw different conclusions from set of facts thus resolved in favor of a party, issues of negligence for jury. Moats v. Lienemann 452

18. Employer not liable for negligence of one whom his employee procures or permits to assist in work without proof that employee had authority from employer to procure or permit assistance. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

19. Where has been continuous or customary use of assistant by employee, and employer has known of this practice and acquiesced in it, employer liable for negligence of assistant as though actually em-

ployed by himself. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
20. Negligence question of fact and may be proved by circumstantial evidence and physical facts; however, law requires that facts and circumstances proved, together with inferences that may properly be drawn therefrom, indicate with reasonable certainty negligent act charged. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
21. Left turn across public highway between intersections fraught with danger, and one making such movement required to exercise degree of care commensurate with the danger. Rowedder v. Rose ---- 664
22. When driver of motor vehicle turning across highway between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which in plain sight, or in position where cannot see, question for court usually presented. Rowedder v. Rose ---------- 664
23. Driving at speed defined by statute, when such definition sets maximum speed and also includes requirement that such speed be reasonable and proper, having regard for traffic, use of road, condition of road, and requirement not to exceed rate of speed such as to endanger life or limb of any person, not negligence in absence of other evidence indicating fault. Rowedder v. Rose ---------- 664
24. Duty to sound signal warning of approach of motor vehicle depends largely on circumstances of particular case. Rowedder v. Rose ---------- 664
25. Words "slight" and "gross" as employed in comparative negligence act comparative terms; test statute provides detailed. Johnson v. Roueche ---- 716
26. Meaning of gross negligence under comparative negligence rule not same as meaning of gross negligence under guest passenger statute. Johnson v. Roueche ---------- 716
27. Under comparative negligence statute, if fact finder determines respective parties to be guilty of actionable negligence and contributory negligence, responsibility then on it to make comparison contemplated by statute. Johnson v. Roueche ---------- 716
28. Broker precluded from recovering compensation for his services when selling land of his principal if guilty of misconduct in negotiating contract at var-

iance with one which he is authorized to make, or disobeys his principal's orders or instructions, or causes loss to his principal by reason of his negligence in drawing or negotiating contract of sale for his principal. Wisnieski v. Harms ---------- 721

29. Violation of stop light, standing alone, not sufficient to prove gross negligence. Sacco v. Gau -- 808

New Trial.

1. In order to obtain review of alleged errors occurring during trial, such errors must be pointed out to trial court in motion for new trial and ruling obtained thereon. State v. Ryan ---------- 381
2. Where party has sustained burden and expense of trial and has succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless there is prejudicial error in proceedings by which it was secured. Koob v. Long 640

Notice.

1. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun -- 105
2. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice and hearing before such order. Stauffer v. Weedlun ----- 105
3. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117
4. Real purpose of prescribing manner in which adverse holding will be manifested to give notice to real owner that his title or ownership in danger so that he may, within period of limitation, take action to protect his interest. Whaley v. Mingus ------ 351
5. To be effective against true owner, acts of dominion over land must be so open, notorious, and hostile

as to put ordinarily prudent person on notice of fact that his lands in adverse possession of another. Whaley v. Mingus ---------- 351
6. Provision of cited statute requiring notice be given to record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment" does not apply to increases ordered by State Board of Equalization and Assessment under later enacted statute. Hansen v. County of Lincoln ---------- 461
7. Erroneous statement by insurer to insured that insurance policy has lapsed for alleged nonpayment of premium not legal equivalent of notice of election to cancel under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
8. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. ---------- 654

Nudity.
1. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628
2. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha 628

Officers.
1. Authority of de facto officer cannot be challenged by collateral attack. State v. Birdwell ---------- 116
2. In quo warranto proceeding, ordinarily burden of proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
3. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
4. Generally, in quo warranto proceeding, when chal-

lenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ------ 710

5. Generally, provisions for holding over until successor elected and qualified do not prolong incumbent's term indefinitely, but only for reasonable time to allow successor to qualify. Stasch v. Weber ---- 710

Oil and Gas.

1. State law applies to leasehold interests under Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. Ohmart v. Dennis ---------- 260
2. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis ---- 260
3. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260

Ordinances.

1. Annexation ordinances may be considered at special meetings of city council in absence of statutory provision to contrary. Holden v. City of Tecumseh ---- 117
2. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117
3. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
4. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243
5. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ------ 243

6. Whether municipal ordinance subject to referendum determined by language of applicable provision for referendum and by facts of each case. Hoover v. Carpenter ---------- 405
7. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha ---------- 628
8. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
9. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628

Parent and Child.
1. In proceeding for modification of order for child support, post-decree birth is change of circumstances, although decree provided for support of unborn child. Schneider v. Schneider ---------- 80
2. Father primarily liable for support of his minor children, his liability being independent of assets of the mother. Schneider v. Schneider ---------- 80
3. Order of trial court in child support proceeding not overturned unless abuse of discretion found. Schneider v. Schneider ---------- 80
4. In determining question of who should have care and custody of children upon divorce, paramount consideration is best interests of welfare of children. Phillips v. Phillips ---------- 89
Scripter v. Scripter ---------- 576
5. If circumstances of parties change and in best interests of children, court may from time to time revise or alter divorce decree so far as custody, care, and maintenance of children concerned. Phillips v. Phillips ---------- 89
6. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown. Phillips v. Phillips ---------- 89
7. Discretion of court respecting custody and support of minor children subject to review; determination of trial court, however, ordinarily not disturbed unless has been clear abuse of discretion or clearly against

weight of evidence. Oberg v. Oberg ---------- 316
8. Person who has care, custody, or control of child and causes death of child by willfully or negligently causing or permitting life of child to be endangered guilty of manslaughter. State v. Crawford ------ 378
9. Parent who negligently or willfully fails to obtain medical aid for child, thereby causing his death, guilty of manslaughter. State v. Crawford -------- 378
10. Order of juvenile court regarding custody of children not disturbed unless clear abuse of discretion or decision against weight of evidence. Anderson v. Doeschot ---------- 444
11. Court which has personal jurisdiction of parties, both of whom are domiciled within state, may determine custody of child as between parties even though child absent from jurisdiction. Loveall v. Loveall 457
12. Court which has personal jurisdiction of parties may determine custody of child as between parties although child neither domiciled nor present in state. Loveall v. Loveall ---------- 457
13. In habeas corpus proceeding to determine custody of child, prime consideration is welfare of child. Loveall v. Loveall ---------- 457
14. Ordinarily, effect given to prior judgment of another state determining custody of child as matter of comity unless change in circumstances requires different result. Loveall v. Loveall ---------- 457
15. In determining question of who should have care and custody of children, paramount consideration is best interests of welfare of children. Gydesen v. Gydesen ---------- 538
16. Discretion of lower court with respect to awarding custody of minor children subject to review, but determination of lower court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Scripter v. Scripter -- 576
17. Neglected child is child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of fault or habits of parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for health, morals, or well-being of such child. Healey v. Johnson ---------- 677
Healey v. Hartman ---------- 682
18. In cases involving child custody determinations in juvenile court and other courts, findings of trial

court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown or decision against weight of evidence. Healey v. Johnson ---------- 677

19. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion shown. Healey v. Hartman ---------- 682

20. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---------- 682

21. Affection, confidence, and gratitude of parent to child which inspires gift is natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse judgment and control will of donor. Gaeth v. Newman ---------- 756

22. Division of property and allowance of alimony and child support in divorce actions always to be determined by facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. Sees v. Sees ---------- 769

23. In determining child custody, paramount consideration is best interests and welfare of children. Nemecek v. Nemecek ---------- 799

Parties.

1. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its welfare. Cain v. Adams ---------- 152

2. Defendant in Nebraska Penal and Correctional Complex under no disability barring prosecution of action in courts of this state by reason of his imprisonment. Vacek v. Marburger ---------- 180

3. Words "unavoidably prevented" refer to circumstances beyond control of party desiring to file pleading in our courts; law requires diligence on part of clients and attorneys and mere neglect of either will not enable party to relief on that ground. Vacek v. Marburger ---------- 180

4. Indispensable parties to suit those who have such interest in controversy that court cannot render judg-

ment without affecting their interest. Ohmart v. Dennis ---------- 260

5. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns -------- 304

6. Contract should be so construed as to give effect to intention of parties rather than defeat purpose for which it was executed. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308

7. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. -- 308

8. Owner who contracts to procure insurance to cover contractor and fails to do so or who procures such insurance and fails to have contractor named as an insured becomes insurer of contractor. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. -------- 308

9. Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308

10. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb ---------- 319

11. One who commits act in one state intentionally resulting in crime in another state may be extradited, and the statement in Governor's warrant that accused is fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded as surplusage. State of Kansas v. Holeb ---------- 319

12. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v. Martin 393

13. Courts will enforce valid stipulations unless some good cause shown for declining to do so, especially where stipulations acted upon so that parties could not be placed in status quo. Martin v. Martin ---- 393
14. Parties bound by stipulations voluntarily made and relief from such stipulations after judgment warranted only under exceptional circumstances. Martin v. Martin ---------- 393
15. Generally, suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed. Hansen v. County of Lincoln ---------- 461
16. Ordinarily, action may not be maintained as class action by plaintiff on behalf of himself and others unless he has power as member of class to satisfy judgment on behalf of all members of class. Hansen v. County of Lincoln ---------- 461
17. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
18. Agreement by holder to suspend right to enforce promissory note against maker, without consent of endorser and without express reservation of rights against him, discharges endorser from liability. Citizens State Bank v. Beermann Bros. Dehy ---------- 597
19. Appeal to Supreme Court in civil action will be considered upon theories presented by parties at trial, provided liberal construction of pleadings, as construed by parties, will permit. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
20. Cited statute provides any elector of appropriate county may bring quo warranto proceeding against any county public office holder when county attorney of appropriate county refuses to do so. Stasch v. Weber ---------- 710
21. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
22. If intent of aider different from that of perpetrator, aider's guilt measured by intent that actuated him. State v. Rice ---------- 728
23. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive;

malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ---------- 728
24. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728
25. Two or more defendants may be tried together where each of defendants charged with accountability for offense or offenses or where offense part of common scheme, plan, or conspiracy. State v. Rice ---------- 728
26. Defendants challenging joint trial must affirmatively demonstrate that joint trial has prejudiced their individual rights. State v. Rice ---------- 728
27. Interpretation given contract by parties themselves while engaged in performance of it is one of best indications of true intent of contract, and ordinarily, such construction of contract should be enforced. Ranchland Auto, Inc. v. Cleveland ---------- 804
28. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland ---------- 804
29. Where there are multiple defendants and judgment entered dismissing action as to one or more, but not all, defendants, judgment is final and appealable order. Green v. Village of Terrytown ---------- 840

Partition.

1. Where upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales; such discretion judicial one which may not be arbitrarily exercised. Supreme Court will not intervene except in case of abuse of such discretion by trial court. Glaser v. Weinberger 205
2. Upset bid following judicial sale and before final confirmation considered only when affords convincing proof that property sold at inadequate price and that just regard for rights of all concerned and stability of judicial sales permits its acceptance. Glaser v. Weinberger ---------- 205
3. In determining whether to accept or reject upset bid, court must elect between two conflicting duties;

ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

Payment.

1. Final settlement not synonymous with final payment; precedes payment and denotes proper administrative determination with respect to amount due. Boyd v. Benkelman Public Housing Authority ----- 69
2. Where insured because of errors in billing by agent of insurance company pays only that portion of renewal premium set forth in billing instead of entire premium, renewal policy not void but voidable at election of company under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590

Pedestrians.

1. Failure of pedestrian with right-of-way to see approaching car within limit of danger or to misjudge its speed not ordinarily contributory negligence as matter of law. Baker v. Daly ---------- 156
2. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640
3. No person shall turn vehicle from direct course on highway unless such movement can be made with reasonable safety, and then only after giving clearly audible signal by sounding horn if any pedestrian may be affected by such movement. Koob v. Long 640

Penalties.

1. As general rule, question of whether sum mentioned in contract considered as liquidated damages or penalty question of law, dependent on construction of contract by court. Abel Constr. Co. v. School Dist. of Seward ---------- 166
2. If damages arising from breach of contract difficult of ascertainment or admeasurement, and if stipulated amount not disproportionate to amount of damages reasonably anticipated from breach, us-

ually regarded as provision for liquidated damages. Abel Constr. Co. v. School Dist. of Seward ------ 166
3. Liquidated damages in fixed sum for each day's delay in performing construction contract, which in effect grades damages according to extent of breach, and where effect of delay difficult to estimate and daily amounts not clearly unreasonable, not penal. Abel Constr. Co. v. School Dist. of Seward ------ 166

Plea Bargaining.

Under circumstances in this case, where plea of guilty induced in part by misunderstanding as to recommendation county attorney would make at sentencing hearing, sentence vacated and cause remanded for resentencing. State v. Kimes -------- 85

Pleadings.

1. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly -------- 156
2. Damage claimed to result from improper design or construction of highway should be pleaded specially. Verzani v. State ---------- 162
3. Words "unavoidably prevented" refer to circumstances beyond control of party desiring to file pleading in our courts; law requires diligence on part of clients and attorneys and mere neglect of either will not enable party to relief on that ground. Vacek v. Marburger ---------- 180
4. Immaterial that complaint did not specifically allege commission of acts in this state intentionally resulting in crime in Kansas when requisition makes such facts clear. State of Kansas v. Holeb ------ 319
5. One who commits act in one state intentionally resulting in crime in another state may be extradited, and statement in Governor's warrant that accused is fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded as surplusage. State of Kansas v. Holeb ---------- 319
6. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff and effect of denial to put burden on plaintiff to establish by evidence matter denied. First Nat. Bank of Bellevue v. Rose ---------- 362
7. Where answer to petition consists of general denial,

defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition; for such purposes, no other allegations in answer necessary. First Nat. Bank of Bellevue v. Rose ---------- 362

8. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Smith ---- 388

9. Where discretionary duty imposed upon district court to determine whether or not good cause shown to grant leave to party to plead out of time, its decision not ordinarily disturbed absent showing abuse of discretion. Neumeyer v. Omaha Public Power Dist. ---------- 516

10. Purpose of summary judgment proceeding to pierce allegations of pleadings and show conclusively that controlling facts otherwise than alleged and that moving party entitled to judgment as matter of law. Frazier, Inc. v. 20th Century Builders, Inc. -- 618

11. Obligation to defend suit for insured should be determined on basis of whether petition filed against him attempts to allege liability within terms of policy. Frazier, Inc. v. 20th Century Builders, Inc. 618

12. Mere allegation of existence of confidential or fiduciary relationship legal conclusion only and insufficient to raise any issue of fact. Degmetich v. Beranek ---------- 659

13. Appeal to Supreme Court in civil action will be considered upon theories presented by parties at trial, provided liberal construction of pleadings, as construed by parties, will permit. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669

14. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to attention of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673

15. Fact alone that answer filed 10 days after answer

day without leave of court not sufficient ground for thereafter entering default judgment against defendant. Vacanti & Randazzo Constr. Co. v. H.I.E. Food Products, Inc. ---------- 680

16. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Howell -- 687

17. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show he is acting in good faith and appeal has merit, he has failed to sustain required burden of proof. State v. Howell ---------- 687

18. Cross-petition or cross-claim not limited to equitable action under our procedure; is substance of action rather than form of it which will determine availability of relief; criterion to be applied is that issues raised by cross-bill must be so closely connected with cause of action in original suit that cross-claim is mere auxiliary or dependency upon original action. The Tilden Bank v. Retzlaff ---- 834

19. New and distinct matter not maintainable under provisions of code as counterclaim and not involved in proper determination of subject matter of original suit must be litigated in separate action. The Tilden Bank v. Retzlaff ---------- 834

20. Matters set up in cross-petition must be germane to original suit under code quite as much as under chancery practice. The Tilden Bank v. Retzlaff -- 834

21. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

Post Conviction.

1. Matters relating to sentences imposed within statutory limits not basis for post conviction relief. State v. Birdwell ---------- 116

2. Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130

3. When counsel has advised defendant to plead guilty, defendant who heeded such advice may not subsequently attack voluntariness of guilty plea so long as counsel's advice within range of competence demanded of attorneys in criminal cases. State v. Hall ---------- 130

4. That guilty plea must be intelligently made, not a requirement that all advice offered by defendant's lawyer withstand retrospective examination in post conviction hearing. State v. Hall ---------- 130
5. In post conviction cases, rule clear that petitioner has burden of establishing basis for relief. State v. Fusby ---------- 139
6. Repetitive applications for post conviction relief may be deemed abuse of judicial process. State v. Pilgrim ---------- 213
7. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Smith -- 388
8. Where files and records show defendant not entitled to post conviction relief, motion properly denied. State v. Ransom ---------- 499
9. Motion to vacate judgment and sentence under Post Conviction Act cannot be used as substitute for appeal or to secure further review of issues already litigated. State v. Weiland ---------- 626
10. Where facts and issues which are ground of motion for post conviction relief known to defendant and his counsel, and raised, heard, and determined at time of trial resulting in conviction but not raised in direct appeal, those issues not ordinarily considered in post conviction review. State v. Weiland - 626
11. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Howell -- 687
12. Appeal of post conviction proceeding from court inferior in jurisdiction to district court may only be taken to district court. State v. Williams ---- 802

Postal Service.

When person is first party to transaction to make use of mails and thereby effects delivery of instrument, he has made postal service his agent. State of Kansas v. Holeb ---------- 319

Powers.

1. A State not constrained in exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treat-

ment. State v. Eckstein ---------- 146
2. Power of a state to absolutely prohibit sale of intoxicating liquors includes power to prescribe conditions under which it may be sold. Major Liquors, Inc. v. City of Omaha ---------- 628
3. A state may protect its people against evils incident to use of intoxicants, and may exercise large discretion as to means employed. Major Liquors, Inc. v. City of Omaha ---------- 628
4. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha ---------- 628
5. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
6. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628
7. Attorney General may on his own relation in name of State of Nebraska bring action for declaratory judgment challenging constitutionality of statute which Tax Commissioner of State proposes to implement by enforcement and regulation pursuant to duties imposed upon that officer by statute and Constitution. State ex rel. Meyer v. Peters ----- 817
8. Rule that person may not attack constitutionality of statute where his rights not thereby affected applies to private persons and not to Attorney General who is acting in public interest. State ex rel. Meyer v. Peters ---------- 817

Principal and Agent.

1. Insurance agent who solicits application for insurance is, in controversy arising between insured and company issuing policy, regarded as representing company and not insured. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
2. Insurance agent who with authority receives and receipts for money for renewal of insurance policy deemed to all intents and purposes agent of company. Squires v. Implement Dealers Mut. Ins. Co. 590
3. Where insured because of errors in billing by agent of insurance company pays only that portion of renewal premium set forth in billing instead of

entire premium, renewal policy not void but voidable at election of company under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ----- 590

4. Broker precluded from recovering compensation for his services when selling land of his principal if guilty of misconduct in negotiating contract at variance with one which he is authorized to make, or disobeys his principal's orders or instructions, or causes loss to his principal by reason of his negligence in drawing or negotiating contract of sale for his principal. Wisnieski v. Harms ---------- 721

Privileged Communications.

1. Absolute privilege attaches to defamatory statements made incident to, and in course of, judicial proceeding if defamatory matter has some relation to proceedings. Sinnett v. Albert ---------- 176
2. Rule of absolute privilege applicable not only to judicial proceedings but to quasi-judicial proceedings as well. Sinnett v. Albert ---------- 176
3. Absolute privilege to publish false and defamatory matter in complaint made to committee on inquiry of Nebraska State Bar Association regarding alleged misconduct of attorney where defamatory matter related thereto. Sinnett v. Albert ---------- 176

Probation and Parole.

In imposing sentence and denying probation in criminal case, judgment of district court not disturbed on appeal unless record shows abuse of discretion. State v. Cottone ---------- 102

Property.

1. Not unconstitutional for public school district to use or lease classrooms in church or other sectarian building for public school purposes if property used or leased under control of public school authorities and instruction offered secular and nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education ---------- 1
2. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in any respect to conform to contract. Maas v. Scoboda 189
3. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda ---------- 189

4. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts question of fact for jury. Maas v. Scoboda ---------- 189
5. Law regards parties as being competent to contract as they see fit with respect to satisfactory character of equipment sold, and seller assumes hazard of rendering performance according to terms of contract. Maas v. Scoboda ---------- 189
6. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
7. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal 200
8. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ---------- 200
9. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
10. Upset bid following judicial sale and before final confirmation considered only when affords convincing proof that property sold at inadequate price and that just regard for rights of all concerned and stability of judicial sales permits its acceptance. Glaser v. Weinberger ---------- 205
11. In determining whether to accept or reject upset bid, court must elect between two conflicting duties; ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205
12. Amount of alimony granted wife not determined alone from property possessed by husband; many

other factors enter into its determination. Newton v. Newton ---------- 242
13. State law applies to leasehold interests under Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. Ohmart v. Dennis ---------- 260
14. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis ---- 260
15. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260
16. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns ---------- 304
17. Fixed monuments and surveys staked out on ground control over field notes showing courses, distances, and quantities; or description of survey in words; or picturization of survey in plat. Phillippe v. Horns _ 304
18. Visible and hostile possession, with intention to possess land occupied under belief that it belongs to possessor, constitutes its adverse character. Whaley v. Mingus ---------- 351
19. Real purpose of prescribing manner in which adverse holding will be manifested to give notice to real owner that his title or ownership in danger so that he may, within period of limitation, take action to protect his interest. Whaley v. Mingus ------- 351
20. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue ---- 354
21. True consideration for deed of conveyance of real estate may be shown by parol evidence, although deed recites consideration. Weiner v. Hroch ------ 389

22. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair and equitable result under all circumstances. Martin v. Martin ---------- 393
23. Division of property and allowance of alimony in divorce actions always determined by facts of each case. Junker v. Junker ---------- 555
24. Rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such award can be exactly determined; generally speaking, awards of Supreme Court in such cases vary from one-third to one-half of value of property involved, depending upon facts and circumstances of particular case. Junker v. Junker -- 555
25. Property owned in joint tenancy passes by reason of nature of title to surviving joint tenant upon death of other and does not pass by virtue of provisions of will of first joint tenant to die. Sheldon v. Watkins 599

Prosecuting Attorneys.

Duty of prosecuting attorney to conduct trial in such manner as will be fair and impartial to rights of accused, no matter how guilty he may be. State v. Casados ---------- 91

Public Building Commissions.

1. Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility. Dwyer v. Omaha-Douglas Public Building Commission ----- 30
2. One-half mill levy made by Omaha-Douglas Public Building Commission under authority of L. B. 1003, 82nd Legislative Session, not county tax subject to provisions of Article VIII, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
3. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ------ 30
4. L. B. 1003, 82nd Legislative Session, which enabled cities of metropolitan class and county in which such

city located to create public building commission authorized to furnish facilities for joint use of city and county pertains to matter of state concern and not just strictly municipal affair. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. Building for governmental purposes not work of internal improvement under provisions of Article XIII, section 2, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ------ 30
6. Tax authorized to be levied by city of metropolitan class under provisions of L. B. 1003, 82nd Legislative Session, not a tax for corporate purposes and is one levied by local authority; does not contravene Article VIII, section 7, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---- 30

Public Lands.

1. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
2. Burden of establishing ownership of compensable interest in "improvements" on school land leases on lessee; burden may be satisfied by proof of purchase, or proof that lessee personally placed improvements on land, or proof that they were acquired by gift. State v. Bush ---------- 824
3. Presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in tenant nor satisfy burden of proving ownership. State v. Bush ---------- 824
4. Fact of ownership of improvements does not establish right to receive compensation nor determine any valuation of such improvements. State v. Bush -- 824
5. Fencing by tenants of school lands does not require approval from Board of Educational Lands and Funds. State v. Bush ---------- 824
6. In absence of agreement, tenant on school lands has compensable interest in crops, annual or perennial, growing on such lands on date of termination of his lease. State v. Bush ---------- 824
7. In event of sale of school lands to third person, ten-

ant has right to compensation resulting from "improvements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Public Officers and Employees.

Crime of embezzlement of public money as defined by cited statute applies only to officers or persons charged by law with performance of duties therein mentioned, and police patrolman collecting coins from parking meters as part of duties designated by his superior cannot properly be informed against thereunder. State v. Williams ---------- 565

Public Service Commissions.

1. Failure of Railway Commission previous to January 1, 1968, to enunciate rule and regulation on tacking cannot be construed to imply right to tack inherent in certificates heretofore issued unless specifically restricted. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
2. Right to prohibit tacking of regular to irregular route authorities, or irregular to irregular route authorities, policy determination within inherent authority of Railway Commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
3. Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
4. Tacking is extension of authorized service; must be and is under regulation of Railway Commission rather than being left to unbridled discretion of carriers subject to regulation by commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
5. On appeal from order of Railway Commission administrative or legislative in character, only questions to be determined whether commission acted within scope of its authority and whether order reasonable and not arbitrarily made. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
6. In determining issue of public convenience and necessity, in cases where new or extended operating rights sought, controlling questions whether operation will serve useful purpose responsible to public demand or need; whether this purpose can or will be served

as well by existing carriers; and whether it can be served by applicant in specified operation without endangering or impairing operations of existing carriers contrary to public interest. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. 400

7. Purpose of Nebraska Motor Carrier Act was regulation for public interest. Purpose not to stifle legitimate competition but to foster it; purpose not to create monopolies in transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition normal attribute of free enterprise system and must be permitted to exist and law contemplates that it shall. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400

8. In granting certificate of public convenience and necessity, Railway Commisison, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service; and second, that service offered is or will be required by present and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474

9. Matter of determination of public convenience and necessity peculiarly within discretion and expertise of Railway Commission and its action will not be disturbed by Supreme Court in absence of showing that such action illegal or arbitrary, capricious, and unreasonable. Robinson v. National Trailer Convoy, Inc. ---------- 474

10. If there is evidence to sustain findings of Railway Commission, Supreme Court may not intervene; is only where findings of commission are against all evidence that Supreme Court may hold commission's findings arbitrary and capricious. Robinson v. National Trailer Convoy, Inc. ---------- 474

11. On appeal from Railway Commission, judicial review limited to determination whether commission acted within scope of its authority and whether order in question reasonable and not arbitrarily made. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

12. In considering application for permit as contract carrier, Railway Commission required to weigh special needs of shippers desiring contract carrier service; effect on protesting carriers of grant of appli-

cation and effect on shippers of denial factors to be weighed in determining if grant of application consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---- 584

13. Burden upon applicant for permit as contract carrier to show that proposed service specialized and fits need of proposed contracting shippers, that applicant fit, willing, and able to perform service, and that proposed operation will be consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

14. Where transportation of specified commodities can be performed as well by common carriers as by contract carriers, need for contract carriers not established. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

15. If competent proof made by applicant showing proposed service specialized and needed, and protested by common carriers showing willingness and ability to perform it, applicant must then establish he is better equipped and qualified to meet special needs of proposed contracting shippers than protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

16. Adequacy of existing services to perform normal needs of proposed contracting shippers not conclusive where new service better designed to fit special requirements of proposed contracting shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

17. Where is evidence to sustain factors for and against issuance of permit to contract carrier, required to be considered by Railway Commission by cited statutes, determination of public interest for commission and not courts. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

18. Past unlawful actions do not necessarily bar on grounds of unfitness future grants of operating authority if public interest will best be served by approval. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

19. In adopting constitutional provision authorizing an Industrial Commission, it was made an independent part of Constitution of Nebraska and not as an amendment to Article II. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

Quo Warranto.

1. In quo warranto proceeding, ordinarily burden of proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
2. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
3. Cited statute provides any elector of appropriate county may bring quo warranto proceeding against any county public office holder when county attorney of appropriate county refuses to do so. Stasch v. Weber ---------- 710
4. Generally, in quo warranto proceeding, when challenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ---- 710
5. Generally, provisions for holding over until successor elected and qualified do not prolong incumbent's term indefinitely, but only for reasonable time to allow successor to qualify. Stasch v. Weber 710

Rape.

1. Under law of Nebraska, accused charged with rape cannot be convicted solely on testimony of prosecutrix. State v. Ferguson ---------- 330
2. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330
3. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson -- 330
4. Where punishment of statutory offense left to discretion of court, sentence imposed within statutory limits not disturbed unless abuse of discretion appears. State v. Ferguson ---------- 330
5. Previous chastity essential element of offense of statutory rape of female child under age 18 but over age 15. State v. Brionez ---------- 488
6. Woman who is chaste is one who has never had unlawful sexual intercourse with male person; act of sexual intercourse without consent and against

her will if she is capable of consent does not destroy her chastity. State v. Brionez ---------- 488

Records.

1. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. Simmons ---------- 365
2. In proceeding in error, review solely upon record made by tribunal whose action being reviewed; no new facts or evidence can enter into consideration of court. Harnett v. City of Omaha ---------- 449
3. Where appears in error proceeding that administrative agency acted within its jurisdiction and is some competent evidence to sustain its findings and order, order of administrative agency will be affirmed. Harnett v. City of Omaha ---------- 449

Referendum.

Whether municipal ordinance subject to referendum determined by language of applicable provision for referendum and by facts of each case. Hoover v. Carpenter ---------- 405

Release.

In tort action based exclusively on alleged negligence of employee or agent, valid release of that employee-agent releases employer or principal from liability, even though release specifically reserves all claims against employer-principal. Dickey v. Meier ------ 420

Reports.

1. Sentencing judge has broad discretion in source and type of evidence he may use to assist him in determining kind and extent of punishment to be imposed within limits fixed by statute; he may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of defendant. State v. Minor ------ 23
2. Modern concepts individualizing punishment have made it necessary that sentencing judge not be denied opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to trial. State v. Minor ---------- 23

Res Judicata.

1. Repetitive applications for post conviction relief may be deemed abuse of judicial process. State v. Pilgrim ---------- 213
2. Under rule of res judicata, conclusiveness of prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in final judgment, whether raised or not. State v. Lessert ---------- 243
3. Conclusiveness of prior judgment precluding subsequent litigation of same cause of action between same parties much broader in its application than determination of questions actually involved in prior action; conclusiveness of judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in final judgment, whether formally raised or not. State ex rel. Southeast Rural Fire P. Dist. v. Grossman ---------- 424
4. A variable in issue preclusion is identity of issues in the two trials. Drainage Dist. No. 10 v. Canaday 701
5. Statutory provisions may cut across issue preclusion at common law. Lost Creek Drainage Dist. v. Elsam ---------- 705

Right to Counsel.

1. In criminal prosecution right of indigent to assistance of counsel does not encompass an unbridled right to choose his counsel. State v. Reed ---------- 195
   State v. Thunder Hawk ---------- 294
2. When competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, only alternatives to proceed with appointed counsel or proceed pro se. State v. Reed ---------- 195
3. When unjustified obstreperous conduct of competent defendant prevents services of appointed counsel, accused cannot complain of lack of services of counsel caused by such conduct. State v. Reed ---- 195
4. When competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, only alternative to proceed pro se. State v. Thunder Hawk ---------- 294

Rules of Suprme Court.

1. Rule 20. State v. Davis ---------- 100
   Booth v. Booth ---------- 205
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   State v. Redemer ---------- 653
   State v. Miller ---------- 659
2. Failure of appellee to file brief in Supreme Court not concession of error; record and brief of appellant must be considered. Drainage Dist. No. 10. v. Canaday ---------- 701

Sales.

1. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in any respect to conform to contract. Maas v. Scoboda -- 189
2. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal 200
3. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
4. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
5. Where upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales; such discretion judicial one which may not be arbitrarily exercised. Supreme Court will not intervene except in case of abuse of such discretion by trial court. Glaser v. Weinberger 205
6. Upset bid following judicial sale and before final confirmation considered only when affords convincing proof that property sold at inadequate price and that just regard for rights of all concerned and stability of judicial sales permits its acceptance. Glaser v. Weinberger ---------- 205
7. In determining whether to accept or reject upset bid, court must elect between two conflicting duties; ordinarily must strive to obtain best price possible

for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

8. Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---------- 362

9. Amount recoverable for breach of agreement by seller of business not to engage in competition with buyer is loss which latter has sustained, naturally resulting from breach. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435

Schools and School Districts.

1. Not unconstitutional for public school district to use or lease classrooms in church or other sectarian building for public school purposes if property used or leased under control of public school authorities and instruction offered secular and nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education ---------- 1

2. A school district in this State is creature of statute and possesses no other powers than those granted by Legislature. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

3. Legislature has plenary power and control over school districts, including provision for appointment or election of governing bodies thereof; consequently, it may provide limitations on any authority to be exercised by school board. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

4. Legislature has complete control of actions of school boards; whether or not Legislature acted wisely in premises not matter for judicial determination; courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. School Dist. of Seward Education Assn. v. School Dist. of Seward 772

5. While there are many nebulous areas that may overlap working conditions, boards should not be required to enter negotiations on matters which are predominately matters of educational policy, man-

agement prerogatives, or statutory duties of board of education. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

Searches and Seizures.

1. When condition of automobile, indicative of criminal offense in plain sight of officer looking at automobile from outside, examination justified and legal. State v. Etchison ---------- 134
2. Affidavit for search warrant not defective simply because based on hearsay, so long as affidavit discloses substantial basis for crediting hearsay. State v. Howard ---------- 494
3. Firsthand knowledge of informant, acquired by sight or hearing, self-corroborating and tends to fulfill both aspects of Aguilar test. State v. Howard 494
4. Affidavit for search warrant sufficient to meet standards of Fourth Amendment to Constitution of United States if complies with ruling in United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. State v. Rice ---------- 728
5. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
6. Fourth Amendment does not clearly delineate between searches which are legal and those which are illegal; only prohibits unreasonable, with each particular case being decided on own circumstances. State v. Rice ---------- 728
7. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
8. Exception to exclusionary rules of search and seizure is rule of harmless error beyond reasonable doubt. State v. Reed ---------- 815

Security Interest.

Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---------- 362

Self-Incrimination.

1. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
2. By statute, witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy. State v. Bittner ---------- 298
3. Trial court, in exercise of sound discretion, must determine whether witness' claim of privilege justifiable. State v. Bittner ---------- 298
4. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality bad, but such attack must be addressed directly to his reputation for truth and veracity. State v. Bittner 298
5. When chastity not an issue, evidence of general reputation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298

Sentences.

1. Sentencing judge has broad discretion in source and type of evidence he may use to assist him in determining kind and extent of punishment to be imposed within limits fixed by statute; he may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of defendant. State v. Minor ---------- 23
2. Modern concepts individualizing punishment have made it necessary that sentencing judge not be denied opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to trial. State v. Minor ---------- 23
3. Under circumstances in this case, where plea of guilty induced in part by misunderstanding as to recommendation county attorney would make at sentencing hearing, sentence vacated and cause remanded for resentencing. State v. Kimes ---------- 85
4. Sentence imposed within statutory limits not ordinarily disturbed in absence of abuse of judicial discretion. State v. Meloy ---------- 98

State v. Bittner ---------- 298
State v. Johnson ---------- 486
State v. Ernest ---------- 648

5. In imposing sentence and denying probation in criminal case, judgment of district court not disturbed on appeal unless record shows abuse of discretion. State v. Cottone ---------- 102
6. Matters relating to sentences imposed within statutory limits not basis for post conviction relief. State v. Birdwell ---------- 116
7. Where punishment for statutory offense left to discretion of court, sentence imposed within statutory limits not ordinarily disturbed unless abuse of discretion appears. State v. Etchison ---------- 134
State v. Ferguson ---------- 330
8. When, in opinion of Supreme Court, sentence excessive or not warranted by evidence, statute contemplates correction on appeal. State v. Etchison ------ 134
9. Where criminal statute amended by mitigating punishment, after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Roberts ---------- 209
State v. Anderson ---------- 491
10. Sentence of not less than 4 nor more than 7 years for manslaughter not excessive. State v. Mathews 251
11. Supreme Court may reduce sentence when in its opinion sentence excessive, and is under duty to render such sentence against accused as in its opinion may be warranted by evidence. State v. Thunder Hawk 294
12. Supreme Court will not interfere with sentence imposed by lower court unless appears to be result of abuse of discretion. State v. Claire ---------- 373
13. Sentence within limits prescribed by statute not disturbed in absence of abuse of discretion. State v. Fincher ---------- 376
State v. Arp ---------- 493
14. Supreme Court will not interfere with sentence imposed by district court unless sentence appears to be abuse of discretion. State v. Koch ---------- 392
15. Supreme Court may reduce sentence when in its opinion sentence excessive; in such case, Supreme Court under duty to render such sentence as evidence warrants. State v. West ---------- 579
16. Sentence dictated by inordinate emotion suspect; is only by coincidence that it finds support in evi-

dence. State v. West ---------- 579

Set-Off and Counterclaim.

1. Cross-petition or cross-claim not limited to equitable action under our procedure; is substance of action rather than form of it which will determine availability of relief; criterion to be applied is that issues raised by cross-bill must be so closely connected with cause of action in original suit that cross-claim is mere auxiliary or dependency upon original action. The Tilden Bank v. Retzlaff ---- 834
2. New and distinct matter not maintainable under provisions of code as counterclaim and not involved in proper determination of subject matter of original suit must be litigated in separate action. The Tilden Bank v. Retzlaff ---------- 834
3. Matters set up in cross-petition must be germane to original suit under code quite as much as under chancery practice. The Tilden Bank v. Retzlaff ---- 834
4. Proper manner in which to challenge appropriateness of counterclaim is by motion to strike. The Tilden Bank v. Retzlaff ---------- 834
5. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

States.

1. State law applies to leasehold interests under Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. Ohmart v. Dennis ---------- 260
2. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis ---- 260
3. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260
4. Power of a state to absolutely prohibit sale of intoxicating liquors includes power to prescribe conditions under which it may be sold. Major Liquors, Inc. v. City of Omaha ---------- 628
5. A state may protect its people against evils incident to use of intoxicants, and may exercise large dis-

cretion as to means employed. Major Liquors, Inc. v. City of Omaha ---------- 628

Statutes.

1. In construing act of Legislature, all reasonable doubts must be resolved in favor of constitutionality. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
2. L. B. 1003, 82nd Legislative Session, does not amend either section 23-119, R. R. S. 1943, or section 23-120, R. S. Supp., 1971, and therefore does not violate Article III, section 14, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
3. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
4. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article III, section 18, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article IX, sections 2, 4, or 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
6. Term family as used in cited statute includes husband who is residing in same household with other members. Nichol v. Clema ---------- 74
7. Medical services furnished husband individually are necessaries within meaning of cited statute for which wife may be liable. Nichol v. Clema ---------- 74
8. Each case of what are necessaries and who is included within term family as provided in cited statute must be determined on its own facts. Nichol v. Clema ---------- 74
9. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demon-

strated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---- 105
10. Agricultural lands, urban or suburban in character, subject to annexation under cited statute. Holden v. City of Tecumseh ---------- 117
11. Cited statute not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate provisions of Eighth Amendment prohibiting cruel and unusual punishments. State v. Eckstein ---------- 146
12. Where criminal statute amended by mitigating punishment, after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Roberts ---------- 209
State v. Anderson ---------- 491
13. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243
14. Unless particular traffic ordinance or statute judicialy declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ----- 243
15. All statutes relating to same subject construed and considered together for purpose of giving effect to legislative intention; all statutes in pari materia considered together and construed as if one law, and, if possible, effect given to each provision. Wulf v. Farm Bureau Ins. Co. ---------- 258
16. Burden on one who attacks statute valid on face to prove facts to establish its invalidity. City of Parkview v. City of Grand Island ---------- 267
17. Requirement in cited statute that annexing city have "sewer treatment facilities" with capacity to serve city annexed, intended to insure that residents of annexed city able to receive sewage treatment service from annexing city. City of Parkview v. City of Grand Island ---------- 267
18. By statute, witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy. State v. Bittner ---------- 298
19. Referential and qualifying words in statute, where

no contrary intention appears, refer solely to last antecedent. Haiar v. Kessler ---------- 312

20. Amendment to dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after effective date of amendment; antecedent of date of amendment is occurrence of tort, not commencement of action or proceeding. Haiar v. Kessler ---------- 312

21. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb ---------- 319

22. Classifications limited to and necessary for accomplishment of legitimate purposes of legislation; question always whether things or persons classified by act form by themselves proper and legitimate class with reference to purposes of act. Sandberg v. State ---------- 335

23. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335

24. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expenditures will serve public interest. Sandberg v. State ---------- 335

25. Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State -- 335

26. Criminal prosecution cannot be maintained under statute requiring permit be obtained from Department of Environmental Control "as required by it," i.e., department, in absence of rules, regulations, or standards fixing circumstances under which such permit "required." State v. West ---------- 371

27. Crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. West ---------- 371
28. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh ---------- 385
29. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh ---------- 385
30. Purpose of Nebraska Motor Carrier Act was regulation for public interest. Purpose not to stifle legitimate competition but to foster it; purpose not to create monopolies in transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition normal attribute of free enterprise system and must be permitted to exist and law contemplates that it shall. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400
31. Amount by which limit exceeded not essential element of offense of speeding, but point system statute requires magistrate or judge make such finding; finding of information to be shown on abstract for conviction. Melanson v. State ---------- 446
32. Provision of cited statute requiring notice be given to record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment" does not apply to increases ordered by State Board of Equalization and Assessment under later enacted statute. Hansen v. County of Lincoln ---------- 461
33. Under provisions of cited statute, county assessor has authority to correct valuations which have become erroneous by reason of judicial declaration of invalidity of increase ordered by State Board of Equalization and Assessment. Hansen v. County of Lincoln ---------- 461

34. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
35. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
36. In granting certificate of public convenience and necessity, Railway Commission, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service, and second, that service offered is or will be required by present and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474
37. Waters which may be discharged into natural depression, draw, or watercourse without liability under provisions of cited statute do not include waste irrigation waters in quantities injurious to neighboring land. Peters v. Langrehr ---------- 480
38. Ordinarily, if amendatory act invalid, original statute remains in effect. State v. Anderson -------- 491
39. Execution and approval of undertaking required in cited statute directory only. Neumeyer v. Omaha Public Power Dist. ---------- 516
40. Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516
41. Section 44-501, R. R. S. 1943, directly conflicts with section 44-380, R. R. S. 1943. Insurance Co. of North America v. County of Hall ---------- 609
42. Section 44-501, R. R. S. 1943, as amended and reenacted by 1951 Legislature, provides that fire insurance policy shall conform as to provisions, agreements, and conditions with 1943 Standard Fire Insurance Policy of New York, and declares that no other or different provision, agreement, or clause shall be made part of such fire insurance policy. Insurance Co. of North America v. County of Hall 609

43. Under section 44-501, R. R. S. 1943, as amended in 1951, an insured's recovery on fire insurance policy limited by provisions of policy as written in conformity with 1943 Standard Fire Insurance Policy of New York. Insurance Co. of North America v. County of Hall ---------- 609
44. By statute (1) on money due on instrument in writing or on settlement of account from day balance agreed upon, interest allowed; and (2) unsettled accounts bear interest after 6 months from date of last item. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
45. By statute, party may recover prejudgment interest and an attorney's fee on claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented claim 90 days prior to commencement of suit; compliance with condition mandatory. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
46. Appeal bond within purview of statute which requires court to disregard defects not affecting substantial rights of adverse party. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. -- 673
47. Child custody statutes of Nebraska to be liberally construed to accomplish purposes of serving best interests of children involved. Healey v. Johnson -- 677
48. Statutory provisions may cut across issue preclusion at common law. Lost Creek Drainage Dist. v. Elsam 705
49. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
State v. Williams ---------- 802
50. In event of sale of school lands to third person, tenant has right to compensation resulting from "improvements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Stipulations.

1. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v.

Martin ---------- 393
2. Courts will enforce valid stipulations unless some good cause shown for declining to do so, especially where stipulations acted upon so that parties could not be placed in status quo. Martin v. Martin ---- 393
3. Parties bound by stipulations voluntarily made and relief from such stipulations after judgment warranted only under exceptional circumstances. Martin v. Martin ---------- 393

Streets.

1. Location of city streets matter generally within discretion of municipal authorities. Holden v. City of Tecumseh ---------- 117
2. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640

Subrogation.

Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308

Supersedeas.

In appealing from decree of foreclosure which orders sale of land, supersedeas bond should be conditioned as set out in cited statute, and amount of pledge matter of judicial discretion; in appealing from decree of foreclosure which directs payment of money and also orders sale of real estate, court may require supersedeas bond in amount computed as specified in said statute. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673

Support of Persons.

1. Medical services furnished husband individually are necessaries within meaning of cited statute for which wife may be liable. Nichol v. Clema ---------- 74
2. Each case of what are necessaries and who is included within term family as provided in cited statute must be determined on its own facts. Nichol v. Clema ---------- 74

Taxation.

1. Power to tax being sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to government, but merely limitations on power which would otherwise be unrestricted. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
2. Constitutional limitations on power to tax must be strictly construed. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
3. One-half mill levy made by Omaha-Douglas Public Building Commission under authority of L. B. 1003, 82nd Legislative Session, not county tax subject to provisions of Article VIII, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
4. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ----- 30
5. Tax authorized to be levied by city of metropolitan class under provisions of L. B. 1003, 82nd Legislative Session, not a tax for corporate purposes and is one levied by local authority; does not contravene Article VIII, section 7, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission --- 30
6. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335
7. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expenditures will serve public interest. Sandberg v. State 335
8. Nothing more familiar in taxation than imposition of tax upon class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for condition to be remedied. Sandberg

v. State ---------- 335
9. Tax not assessment of benefits; is means of distributing burden of cost of government; only benefit to which taxpayer consequently entitled that derived from his enjoyment of privileges of living in organized society, established and safeguarded by devotion of taxes to public purposes. Sandberg v. State ---------- 335
10. Provision of cited statute requiring notice be given to record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment" does not apply to increases ordered by State Board of Equalization and Assessment under later enacted statute. Hansen v. County of Lincoln ---------- 461
11. Under provisions of cited statute, county assessor has authority to correct valuations which have become erroneous by reason of judicial declaration of invalidity of increase ordered by State Board of Equalization and Assessment. Hansen v. County of Lincoln ---------- 461
12. Generally, suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed. Hansen v. County of Lincoln ---------- 461
13. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
14. Attorney General may on his own relation in name of State of Nebraska bring action for declaratory judgment challenging constitutionality of statute which Tax Commissioner of State proposes to implement by enforcement and regulation pursuant to duties imposed upon that officer by statute and Constitution. State ex rel. Meyer v. Peters ---------- 817

Time.

1. Statute of limitations in libel action commences to run upon publication of defamatory matter which forms basis of action. Patterson v. Renstrom ---- 78
2. Provisions in construction contracts providing requests for additional time, necessitated by cause beyond contractor's control, to complete contract must be in writing, generally binding. Abel Constr. Co. v. School Dist. of Seward ---------- 166

3. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of construction contract. Abel Constr. Co. v. School Dist. of Seward ---------- 166
4. Engineer's authority under terms of construction contract to observe, inspect, suspend, or reject work, or make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages. Abel Constr. Co. v. School Dist. of Seward ---------- 166
5. Statutory requirement that Oil and Gas Conservation Commission enter its order within 30 days after hearing directory, not mandatory. Ohmart v. Dennis 260
6. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260
7. Amendment to dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after effective date of amendment; antecedent of date of amendment is occurrence of tort, not commencement of action or proceeding. Haiar v. Kessler ---------- 312
8. Real purpose of prescribing manner in which adverse holding will be manifested to give notice to real owner that his title or ownership in danger so that he may, within period of limitation, take action to protect his interest. Whaley v. Mingus ---------- 351
9. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue ---------- 354
10. Easement for discharge of waste irrigation waters into natural depression, draw, or watercourse flowing through land of another cannot be acquired until it has been freely exercised without material change under claim of right for full period of 10 years. Peters v. Langrehr ---------- 480
11. Where discretionary duty imposed upon district court to determine whether or not good cause shown to grant leave to party to plead out of time, its deci-

sion not ordinarily disturbed absent showing abuse of discretion. Neumeyer v. Omaha Public Power Dist. ---------- 516

12. Unless otherwise specified, consent to extension of promissory note authorizes single extension for not longer than original period of note. Citizens State Bank v. Beermann Bros. Dehy ---------- 597

13. Fact alone that answer filed 10 days after answer day without leave of court not sufficient ground for thereafter entering default judgment against defendant. Vacanti & Randazzo Constr. Co. v. H.I.E. Food Products, Inc. ---------- 680

14. Where notice of appeal not filed within 1 month from entry of judgment or final order appealed from as required by cited statute, Supreme Court obtains no jurisdiction to hear appeal and appeal must be dismissed. State v. Howell ---------- 687

15. Illegality of prisoner's custody prior to issuance of rendition warrant from sister state does not render warrant void and unenforceable. Bell v. Janing ---- 690

16. Application for postponement of time of trial of criminal case addressed to sound discretion of trial court and, in absence of abuse of discretion disclosed by record, denial thereof not error. State v. McClelland ---------- 699

17. Generally, provisions for holding over until successor elected and qualified do not prolong incumbent's term indefinitely, but only for reasonable time to allow successor to qualify. Stasch v. Weber ---------- 710

Torts.

1. Amendment to dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after effective date of amendment; antecedent of date of amendment is occurrence of tort, not commencement of action or proceeding. Haiar v. Kessler ---------- 312

2. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

Trial.

1. Burden of proof of exceptions within ambit of Depressant and Stimulant Drugs Act on party attempting to bring himself within exceptions. State v. Minor ---------- 23

2. Parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 61
3. If circumstances of parties change and in best interests of children, court may from time to time revise or alter divorce decree so far as custody, care, and maintenance of children concerned. Phillips v. Phillips ---------- 89
4. Not burden of State to establish no discrimination in jury selection until at least prima facie case of discrimination established. State v. Casados ---------- 91
5. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Casados ---------- 91
6. Evidence of other crimes, similar to that charged, relevant and admissible when tends to prove particular criminal intent necessary to constitute crime charged. State v. Casados ---------- 91
7. Proof of another distinct substantive crime not admissible in criminal prosecution unless some legal connection between the two upon which it can be said one tends to establish the other or some essential fact in issue. State v. Casados ---------- 91
8. Duty of prosecuting attorney to conduct trial in such manner as will be fair and impartial to rights of accused, no matter how guilty he may be. State v. Casados ---------- 91
9. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105
10. Where actual verbatim record of proceedings on taking plea of guilty lost, reasonably accurate account of what took place established by other evidence not "silent record" within proscription of Boykin v. Alabama. State v. Hall ---------- 130
11. In post conviction cases, rule clear that petitioner has burden of establishing basis for relief. State v. Fusby ---------- 139
12. Instruction that jury to make no inferences from fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Johnson -- 151
13. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its

welfare. Cain v. Adams ---------- 152
14. In every case, before evidence on an issue submitted to jury, preliminary question for court, not whether literally no evidence, but whether any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Baker v. Daly ---------- 156
15. Mere scintilla of evidence not enough to require submission of an issue to jury. Baker v. Daly ---- 156
16. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly ---------- 156
17. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of construction contract. Abel Constr. Co. v. School Dist. of Seward ---------- 166
18. Absolute privilege attaches to defamatory statements made incident to, and in course of, judicial proceeding if defamatory matter has some relation to proceedings. Sinnett v. Albert ---------- 176
19. Rule of absolute privilege applicable not only to judicial proceedings but to quasi-judicial proceedings as well. Sinnett v. Albert ---------- 176
20. Relevancy of defamatory matter not technical legal relevancy but instead general frame of reference and relationship to subject matter of action. Sinnett v. Albert ---------- 176
21. Absolute privilege to publish false and defamatory matter in complaint made to committee on inquiry of Nebraska State Bar Association regarding alleged misconduct of attorney where defamatory matter related thereto. Sinnett v. Albert ---------- 176
22. Against sound principles of professional ethics for one who knows he is to be called as material witness in case to appear as attorney therein. Sinnett v. Albert ---------- 176
23. Defendant in Nebraska Penal and Correctional Complex under no disability barring prosecution of action in courts of this state by reason of his imprisonment. Vacek v. Marburger ---------- 180
24. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and

whether he so acts question of fact for jury. Maas v. Scoboda ---------- 189
25. Conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if pretrial identification procedures so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Reed 195
26. Conviction may rest on uncorroborated testimony of accomplice. State v. Oglesby ---------- 211
27. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
28. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
29. Photographs admissible in evidence if shown true and correct representations of places or subjects purport to represent at times pertinent to inquiry; admission of photographs largely within discretion of trial court and unless abuse of discretion shown, error not predicated thereon. State v. Radcliff --- 236
30. Divorce action for trial de novo in Supreme Court; however it cannot ignore fact that trial court had opportunity to observe parties. Newton v. Newton - 242
31. Judgment of trial court fixing amount of alimony not disturbed on appeal unless good cause shown. Newton v. Newton ---------- 242
32. On appeal to district court from order of Director of Motor Vehicles revoking driver's license for point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at evidentiary hearing and necessary foundational facts must support validity of order of revocation. State v. Lessert ---------- 243
33. Under rule of res judicata, conclusiveness of prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in final judgment, whether raised or not. State v. Lessert ---------- 243
34. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted

of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ------ 243

35. In workmen's compensation case, burden of proof on defense of intoxication on employer. Johnson v. Hahn Bros. Constr., Inc. ---------- 252

36. Order entered denying plea of statute of limitations, after separate hearing on that issue, not final or appealable order. Wulf v. Farm Bureau Ins. Co. - 258

37. Burden on one who attacks statute valid on face to prove facts to establish its invalidity. City of Parkview v. City of Grand Island ---------- 267

38. Jury verdict based upon conflicting evidence not set aside unless so clearly wrong as to induce belief on part of Supreme Court that must have been found through passion, prejudice, mistake, or some means not apparent in record. Wright v. Haffke -- 270

39. In reviewing evidence where jury returned verdict for defendant, defendant must have benefit of any and all reasonable inferences deducible from proof. Wright v. Haffke ---------- 270

40. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. Wright v. Haffke ---------- 270

41. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke ---------- 270

42. Instructions to jury considered as whole; when thus considered, if law correctly stated, case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Wright v. Haffke ---------- 270

43. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions. Demont v. Mattson ---------- 277

44. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ---------- 277

45. More than one act of negligence may in combination amount to gross negligence under guest statute;

several acts should be weighed as whole. Demont v. Mattson ---------- 277
46. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson ---------- 277
47. Where head of family owns or maintains car for family use and family member using car with express or implied consent of owner, negligence of family member driver imputed to head of family. Demont v. Mattson ---------- 277
48. Where reasonable minds might differ as to whether risk assumed, jury question presented. Demont v. Mattson ---------- 277
49. Before contributory negligence of guest passenger presents jury question, must be evidence that it proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
50. Instructions must be considered and construed together. Demont v. Mattson ---------- 277
51. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that personal injury sustained by employee, arising out of and in course of his employment. Breed v. Interstate Glass Co. ---------- 284
52. Granting of continuance is matter within sound discretion of trial judge and denial of motion for continuance not disturbed in absence of abuse of discretion. State v. Meadows ---------- 287
53. Problem concerning admissibility of evidence of other offenses is special aspect of broad general problem of relevancy; generally test of admissibility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or an essential element thereof. State v. Meadows ---------- 287
54. Whenever point reached at which trier of fact being told that which it is entirely equipped to determine without witness' aid, testimony superfluous. State v. Thunder Hawk ---------- 294
55. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality bad, but such attack must be addressed directly to

his reputation for truth and veracity. State v. Bittner ---------- 298
56. When chastity not an issue, evidence of general reputation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298
57. Right to confrontation provided by Sixth Amendment to Constitution of United States not violated when witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to defendant's guilt or innocence. State v. Bittner ---------- 298
58. Ordinarily, uncorroborated testimony of accomplice who has been guilty of conscious falsehood may sustain conviction if proper cautionary instruction given. State v. Bittner ---------- 298
59. Fixing of amount of alimony rests, in each case, within sound discretion of court. Ramold v. Ramold 314
60. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell 323
61. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330
62. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson ---- 330
63. Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---- 362
64. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff and effect of denial to put burden on plain-

tiff to establish by evidence matter denied. First Nat. Bank of Bellevue v. Rose ---------- 362
65. Where answer to petition consists of general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition; for such purposes, no other allegations in answer necessary. First Nat. Bank of Bellevue v. Rose ---------- 362
66. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. State v. Claire ---------- 373
67. Participation in criminal intent may be inferred from presence, companionship, and conduct. State v. Claire ---------- 373
68. In order to obtain review of alleged errors occurring during trial, such errors must be pointed out to trial court in motion for new trial and ruling obtained thereon. State v. Ryan ---------- 381
69. Convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Nero ---------- 383
70. Not province of Supreme Court in reviewing record in action at law to resolve conflicts in or weigh evidence. Weiner v. Hroch ---------- 389
71. Party who appears pro se subject to and will receive same consideration as if he had been represented by attorney. Martin v. Martin ---------- 393
72. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v. Martin ---------- 393
73. Courts will enforce valid stipulations unless some good cause shown for declining to do so, especially where stipulations acted upon so that parties could not be placed in status quo. Martin v. Martin -- 393
74. Parties bound by stipulations voluntarily made and relief from such stipulations after judgment warranted only under exceptional circumstances. Martin

v. Martin ---------- 393
75. In determining issue of public convenience and necessity, in cases where new or extended operating rights sought, controlling questions whether operation will serve useful purpose responsible to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in specified operation without endangering or impairing operations of existing carriers contrary to public interest. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400
76. Trial judge vested with broad discretion to properly circumscribe inquiry into criminal defendant's past conduct when that subject raised during cross-examination of defense character witness. State v. Newte ---------- 412
77. While particular facts inadmissible in evidence upon direct examination for purpose of sustaining or overthrowing character, doctrine does not extend to cross-examination. State v. Newte ---------- 412
78. Upon cross-examination of witness who has testified to general reputation, questions may be propounded for purpose of eliciting source of witness' information, and particular facts may be called to his attention. State v. Newte ---------- 412
79. Extent of cross-examination of witness must be left to discretion of trial court. State v. Newte ---------- 412
80. Character witness may be cross-examined as to an arrest whether or not it culminated in conviction of defendant. State v. Newte ---------- 412
81. Plaintiff must not only show in breach of contract case his right of recovery, but elements and facts which compose measure of his recovery, and not leave jury to rove without guide or compass through limitless fields of conjecture and speculation. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
82. Duty of district court to refrain from submitting to jury issue of damages when evidence such that it cannot determine such issue except by indulging in speculation and conjecture. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
83. Contract restraining person from establishing business competitive with that of other party to it is strictly construed and doubts resolved against latitudinarian construction thereof. Midlands Transp.

Co. v. Apple Lines, Inc. ---------- 435
84. Order of juvenile court regarding custody of children not disturbed unless clear abuse of discretion or decision against weight of evidence. Anderson v. Doeschot ---------- 444
85. Amount by which limit exceeded not essential element of offense of speeding, but point system statute requires magistrate or judge make such finding; finding of information to be shown on abstract for conviction. Melanson v. State ---------- 446
86. In every case, before evidence submitted to jury, there is preliminary question for court to decide, when properly raised, not whether is literally no evidence, but whether is any upon which jury can properly proceed to find verdict for party producing it, upon whom burden of proof imposed. Moats v. Lienemann ---------- 452
87. Motion for directed verdict or for judgment notwithstanding verdict must be treated as admission of truth of all material and relevant evidence submitted on behalf of party against whom motion directed; such party entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be deduced from evidence. Moats v. Lienemann ---- 452
88. In determining question of whether evidence sufficient to submit issues of negligence to jury, a party is entitled to have all conflicts in evidence resolved in his favor and benefit of every reasonable inference that may be deduced from evidence; if reasonable minds might draw different conclusions from set of facts thus resolved in favor of a party, issues of negligence for jury. Moats v. Lienemann 452
89. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
90. Where insurer's defense based upon exclusionary clause in policy, burden on insurer to prove facts which bring it within exclusion. Robinson v. State Farm Mut. Auto. Ins. Co. ---------- 470
91. In granting certificate of public convenience and necessity, Railway Commission, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service, and second, that service offered is or will be required by present

and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474
92. Burden of proof on party relying on breach of warranty to show performance of conditions as to which right to assert warranty depends, or waiver thereof, or excuse for nonperformance. Melcher v. Boesch Motor Co. ---------- 522
93. Issue of whether provision of express warranty unconscionable presents question of law for court. Melcher v. Boesch Motor Co. ---------- 522
94. Objections to forms of verdict should be made before or at time verdict returned. Melcher v. Boesch Motor Co. ---------- 522
95. If jury finds defendant not liable in breach of warranty action, error relating to subject of damages necessarily harmless. Melcher v. Boesch Motor Co. 522
96. In testing sufficiency of evidence to support verdict, must be considered in light most favorable to successful party; every controverted fact must be resolved in his favor and he should have benefit of every inference that can be reasonably drawn therefrom. Lake v. Southwick ---------- 533
97. Opinions of experts not binding on trier of facts. Swartz v. Hess, Inc. ---------- 542
98. Testimony by plaintiff as to statements of defendants' agent made to third party and related to plaintiff by third party admissible to show statements were related to plaintiff and that he relied on them. Ristine v. Geigy Agricultural Chemicals 550
99. In every case, before evidence submitted to jury, is preliminary question for court to decide, when properly raised, not whether is literally no evidence, but whether is any evidence upon which jury can properly proceed to find verdict for party producing it, upon whom burden of proof imposed. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
100. While expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon precise or ultimate fact in issue before jury, which must be determined by it. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
101. Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence not sufficient to sustain verdict unless circumstances proved by evidence of such nature and so related to each other that conclusion

reached by jury only one that can fairly and reasonably be drawn therefrom. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
102. Conjecture, speculation, or choice of possibilities not proof; must be something more which will lead reasoning mind to one conclusion rather than another. Barkalow Bros. Co. v. Floor-Brite, Inc. -- 568
103. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
104. Negligence question of fact and may be proved by circumstantial evidence and physical facts; however, law requires that facts and circumstances proved, together with inferences that may properly be drawn therefrom, indicate with reasonable certainty negligent act charged. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
105. Anomie in criminal process is variable not to be forgotten, although its weight is light in any one case. State v. West ---------- 579
106. Findings of court in law action in which jury waived have effect of verdict of jury and will not be disturbed on appeal unless clearly wrong. Squires v. Implement Dealers Mut. Ins. Co. ------ 590
107. Where facts and issues which are ground of motion for post conviction relief known to defendant and his counsel, and raised, heard, and determined at time of trial resulting in conviction but not raised in direct appeal, those issues not ordinarily considered in post conviction review. State v. Wieland 626
108. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Koob v. Long ---------- 640
109. Claimant of substantial damages must furnish appropriate data to enable trier of fact to find amount of damages with reasonable certainty if evidence of damages or amount thereof susceptible of definite proof; damages may not be established by conjecture, speculation, or doubtful proof. Masten v. Campbell Manuf. Co. ---------- 646
110. Admission of executor or administrator not receivable against him as party in his personal capacity.

Degmetich v. Beranek ---------- 659
111. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659
112. When driver of motor vehicle turning across highway between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which in plain sight, or in position where cannot see, question for court usually presented. Rowedder v. Rose ---------- 664
113. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Rowedder v. Rose ---------- 664
114. Court in every stage of action must disregard any error which does not affect substantial rights of adverse party; no judgment shall be reversed by reason of error. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
115. Appeal to Supreme Court in civil action will be considered upon theories presented by parties at trial, provided liberal construction of pleadings, as construed by parties, will permit. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
116. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to attention of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
117. In cases involving child custody determinations in juvenile court and other courts, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown or decision against weight of evidence. Healey v. Johnson ---------- 677
118. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion

shown. Healey v. Hartman ---------- 682
119. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---------- 682
120. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Howell -- 687
121. When evidence of guilt clear and exclusion of erroneous evidence obviously would not have resulted in different verdict, admission of such evidence harmless error. State v. Howell ---------- 687
122. Upon appeal to district court from decision of board of supervisors of drainage district, all original objections made to classification and assessment of benefits heard and determined in summary manner as in equity, and upon appeal to Supreme Court, cause tried de novo. Drainage Dist. No. 10 v. Canaday ---------- 701
123. In quo warranto proceeding, ordinarily burden of proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
124. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
125. Generally, in quo warranto proceeding, when challenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ------ 710
126. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Johnson v. Roueche -------- 716
127. Under comparative negligence statute, if fact finder determines respective parties to be guilty of actionable negligence and contributory negligence, responsibility then on it to make comparison contemplated by statute. Johnson v. Roueche ---------- 716
128. Credibility of witnesses and weight to be given their testimony for jury's consideration and not for court. Wisnieski v. Harms ---------- 721
129. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of

guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice 728
130. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice 728
131. Two or more defendants may be tried together where each of defendants charged with accountability for offense or offenses or where offense part of common scheme, plan, or conspiracy. State v. Rice 728
132. Defendants challenging joint trial must affirmatively demonstrate that joint trial has prejudiced their individual rights. State v. Rice 728
133. Irrelevant and immaterial evidence erroneously admitted not necessarily prejudicial. State v. Rice 728
134. Related instructions must be read and construed as whole and if when so read and construed they correctly state the law there is no error. State v. Rice 728
135. Questions of credibility ordinarily for jury to determine and not for court. State v. Rice 728
136. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving confidential relationship existed between parties rests on one attacking gift. Gaeth v. Newman 756
137. Where facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman 756
138. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Gaeth v. Newman 756
139. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland 804
140. Ordinarily, party entitled to benefit of testimony of other witnesses in contradiction of his own, wherever his own not of character of judicial admission, and concerns only some evidential or constituent circumstance of his case; this is especially so as to circumstances of accident or similar event, because in such

case party's testimony especially subject to inexactness of observation and memory. Sacco v. Gau ---- 808
141. Where party testifies clearly and unequivocally to fact which is within his own knowledge, such testimony may be considered judicial admission; rule has particular application where party so testifying made no effort to retract, qualify, or otherwise explain positive force of his own evidence. Sacco v. Gau ---------- 808
142. Admission in rebuttal of testimony which should have been offered in chief rests in sound discretion of court. Sacco v. Gau ---------- 808
143. Instructions must be confined to issues supported by evidence. Sacco v. Gau ---------- 808
144. Instructions given to jury must be construed together, and if when considered as whole they properly state law, that is sufficient. Sacco v. Gau -------- 808

Trusts.

1. Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under rules of law. Garwood v. Drake University ---------- 605
2. If dominant purpose of charitable trust certain, it will not be denied execution because of absence of perfection of detail or presence of immaterial and inappropriate language in instrument creating trust. Garwood v. Drake University ---------- 605
3. In case of informal trust, mingling of funds proper if such is understanding of parties as shown by their agreement or by their custom. Gaeth v. Newman 756

Undue Influence.

1. Burden of proof upon person asserting undue influence to prove by preponderance of evidence: (1) That grantor, testator, or donor was person who would be subject to such influence; (2) that was opportunity to exercise such influence; (3) that was disposition to exercise such influence; and (4) that result was effect of such influence. Gaeth v. Newman 756
2. Affection, confidence, and gratitude of parent to child which inspires gift is natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse judgment and control will of donor. Gaeth v. Newman ------ 756
3. Where facts and circumstances show such a confi-

dential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman 756

4. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Gaeth v. Newman 756
5. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman 756
6. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
7. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman 756
8. In order to establish undue influence invalidating deed, must be proof that circumstances of execution of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman 756

United States.

1. State law applies to leasehold interests under Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. Ohmart v. Dennis 260
2. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis .. 260
3. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis 260

Vendor and Purchaser.

1. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in

any respect to conform to contract. Maas v. Scoboda 189
2. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda ---------- 189
3. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts question of fact for jury. Maas v. Scoboda ---------- 189
4. Law regards parties as being competent to contract as they see fit with respect to satisfactory character of equipment sold, and seller assumes hazard of rendering performance according to terms of contract. Maas v. Scoboda ---------- 189

Venue.

Granting of change of venue rests in sound discretion of court. State v. McClelland ---------- 699

Verdicts.

1. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Ryan ---------- 381
2. Jury verdict based upon conflicting evidence will not be set aside unless so clearly wrong as to induce belief on part of reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in record. Moats v. Lienemann ---------- 452
3. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict; every controverted fact must be resolved in his favor and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Department of Banking v. Colburn ---------- 500
4. Verdict of jury based upon conflicting evidence not set aside unless clearly wrong. Department of Banking v. Colburn ---------- 500
Melcher v. Boesch Motor Co. ---------- 522
5. Objections to forms of verdict should be made before or at time verdict returned. Melcher v. Boesch Motor

Co. ---------- 522
6. If jury finds defendant not liable in breach of warranty action, error relating to subject of damages necessarily harmless. Melcher v. Boesch Motor Co. 522
7. In testing sufficiency of evidence to support verdict, must be considered in light most favorable to successful party; every controverted fact must be resolved in his favor and he should have benefit of every inference reasonably deduced therefrom. Dahl v. Robinson ---------- 547
8. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake or clear that jury disregarded evidence or controlling rules of law. Dahl v. Robinson ---------- 547
9. In determining sufficiency of evidence to sustain verdict, must be considered most favorably to successful party and all conflicts resolved in his favor. Ristine v. Geigy Agricultural Chemicals ---------- 550
10. Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence not sufficient to sustain verdict unless circumstances proved by evidence of such nature and so related to each other that conclusion reached by jury only one that can fairly and reasonably be drawn therefrom. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
11. Findings of court in law action in which jury waived have effect of verdict of jury and will not be disturbed on appeal unless clearly wrong. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
12. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Koob v. Long ---------- 640
13. Where party has sustained burden and expense of trial and has succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless there is prejudicial error in proceedings by which it was secured. Koob v. Long ---- 640

Waiver.

1. Engineer's authority under terms of construction contract to observe, inspect, suspend, or reject work,

or make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages. Abel Constr. Co. v. School Dist. of Seward ---- 166
2. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda ---- 189

Warranty.
1. Burden of proof on party relying on breach of warranty to show performance of conditions as to which right to assert warranty depends, or waiver thereof, or excuse for nonperformance. Melcher v. Boesch Motor Co ---- 522
2. Issue of whether provision of express warranty unconscionable presents question of law for court. Melcher v. Boesch Motor Co. ---- 522

Waters.
1. Waters which may be discharged into natural depression, draw, or watercourse without liability under provisions of cited statute do not include waste irrigation waters in quantities injurious to neighboring land. Peters v. Langrehr ---- 480
2. Easement for discharge of waste irrigation waters into natural depression, draw, or watercourse flowing though land of another cannot be acquired until it has been freely exercised without material change under claim of right for full period of 10 years. Peters v. Langrehr ---- 480

Weapons and Firearms.
1. Ordinarily, firearm may be used if reasonably necessary to prevent commission of felony or to arrest felon after felony committed. Wright v. Haffke ---- 270
2. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke 270

Wills.
1. Law favors early vesting of estates; in construing will containing devise of life estate and devise of remainder, inference of vested remainder stronger than inference of contingent remainder if meaning obscure in this respect. Rudy v. Wagner ---- 508

2. Words "in the event of death," "in case of death," or "at his death" do not have effect of postponing vesting of estate in remainder to time of death of life tenant. Rudy v. Wagner ---------- 508
3. In absence of provisions indicating contrary, remainder granted in will to children of life tenant becomes vested at once in children, defeasibly, despite presence of limitation over in event of death of life tenant leaving no child. Rudy v. Wagner -- 508
4. Devise to children as class of remainder over after life estate vests title to estate in remainder in such of them as are living at time of death of testator and in those born during continuance of life estate from moment of their birth; estate in remainder when once vested does not lapse by reason of death of beneficiary prior to expiration of life estate unless will so provides. Rudy v. Wagner ---------- 508
5. Where language conveying remainder interest to class does not provide for defeasance in case of death of one of class during continuance of life estate, vested interest of such member of class does not lapse but descends to his heirs. Rudy v. Wagner 508
6. Under specified testamentary language, devise of remainder over after life estate was to children of life tenant as a class; estate in remainder vested in each of them as they were born during continuance of life estate, and did not lapse as to child who predeceased life tenant; remainder defeasible only in event of death of life tenant, leaving no child or children. Rudy v. Wagner ---------- 508
7. Property owned in joint tenancy passes by reason of nature of title to surviving joint tenant upon death of other and does not pass by virtue of provisions of will of first joint tenant to die. Sheldon v. Watkins ---------- 599
8. In construction of joint and mutual will, intention of testator if ascertainable from language of will and not contrary to law must govern. Sheldon v. Watkins ---------- 599
9. Intention of testator as determined from will must be given effect if not inconsistent with any rule of law. Garwood v. Drake University ---------- 605
10. Basic object of will construction to ascertain intent and purpose of testator as shown by will, and then give that intention effect if not contrary to law. Garwood v. Drake University ---------- 605

11. Charitable gift not permitted to fail because of any mistake or ambiguity in describing intended beneficiary or expressing its purpose if from language of bequest, when construed in light of all facts, intent of donor reasonably apparent. Garwood v. Drake University ---------- 605

Witnesses.

1. Wife's incompetency in criminal proceedings against her husband limited to testimonial utterances; she is competent to supply information for presentence report. State v. Minor ---------- 23
2. Against sound principles of professional ethics for one who knows he is to be called as material witness in case to appear as attorney therein. Sinnett v. Albert ---------- 176
3. Conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if pretrial identification procedures so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Reed ---------- 195
4. Conviction may rest on uncorroborated testimony of accomplice. State v. Oglesby ---------- 211
5. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
6. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
7. By statute, witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy. State v. Bittner ---------- 298
8. Trial court, in exercise of sound discretion, must determine whether witness' claim of privilege justifiable. State v. Bittner ---------- 298
9. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality bad, but such attack must be addressed directly to his reputation for truth and veracity. State v. Bittner ---------- 298
10. When chastity not an issue, evidence of general repu-

tation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298

11. Right to confrontation provided by Sixth Amendment to Constitution of United States not violated when witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to defendant's guilt or innocence. State v. Bittner ---------- 298

12. Ordinarily, uncorroborated testimony of accomplice who has been guilty of conscious falsehood may sustain conviction if proper cautionary instruction given. State v. Bittner ---------- 298

13. Under law of Nebraska, accused charged with rape cannot be convicted solely on testimony of prosecutrix. State v. Ferguson ---------- 330

14. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330

15. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson ---------- 330

16. Convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Nero -------- 383

17. Actions in equity on appeal to Supreme Court are triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict it will consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite. Martin v. Martin ------ 393

18. Trial judge vested with broad discretion to properly circumscribe inquiry into criminal defendant's past

conduct when that subject raised during cross-examination of defense character witness. State v. Newte 412
19. While particular facts inadmissible in evidence upon direct examination for purpose of sustaining or overthrowing character, doctrine does not extend to cross-examination. State v. Newte ---------- 412
20. Upon cross-examination of witness who has testified to general reputation, questions may be propounded for purpose of eliciting source of witness' information, and particular facts may be called to his attention. State v. Newte ---------- 412
21. Extent of cross-examination of witness must be left to discretion of trial court. State v. Newte ---------- 412
22. Character witness may be cross-examined as to an arrest whether or not it culminated in conviction of defendant. State v. Newte ---------- 412
23. Hypothetical questions propounded to expert, if so framed as to fairly and reasonably reflect facts proved by any of witnesses in case, will be sufficient, provided subject one proper for expert testimony. Moats v. Lienemann ---------- 452
24. Opinions of experts not binding on trier of facts. Swartz v. Hess, Inc. ---------- 542
25. Testimony by plaintiff as to statements of defendants' agent made to third party and related to plaintiff by third party admissible to show statements were related to plaintiff and that he relied on them. Ristine v. Geigy Agricultural Chemicals ---------- 550
26. While expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon precise or ultimate fact in issue before jury, which must be determined by it. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
27. Actions in equity on appeal to Supreme Court triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Scripter v. Scripter ---------- 576
28. When, as required by statute, district engineer has examined land and made his report to board of supervisors of drainage district which approved report, report furnishes prima facie evidence of classification and benefits, and in absence of fraud, such

evidence sufficient to sustain decision of board unless decision overcome by competent evidence to contrary. Drainage Dist. No. 10 v. Canaday ------ 701
29. Credibility of witnesses and weight to be given their testimony for jury's consideration and not for court. Wisnieski v. Harms ---------- 721
30. Questions of credibility ordinarily for jury to determine and not for court. State v. Rice ---------- 728
31. Ordinarily, party entitled to benefit of testimony of other witnesses in contradiction of his own, wherever his own not of character of judicial admission, and concerns only some evidential or constituent circumstance of his case; this is especially so as to circumstances of accident or similar event, because in such case party's testimony especially subject to inexactness of observation and memory. Sacco v. Gau 808
32. Where party testifies clearly and unequivocally to fact which is within his own knowledge, such testimony may be considered judicial admission; rule has particular application where party so testifying made no effort to retract, qualify, or otherwise explain positive force of his own evidence. Sacco v. Gau ---------- 808

Words and Phrases.

1. Final settlement not synonymous with final payment; precedes payment and denotes proper administrative determination with respect to amount due. Boyd v. Benkelman Public Housing Authority 69
2. Term family as used in cited statute includes husband who is residing in same household with other members. Nichol v. Clema ---------- 74
3. Stealing defined as taking without right or leave, with intent to keep wrongfully. State v. Blotzer -- 143
4. Words "unavoidably prevented" refer to circumstances beyond control of party desiring to file pleading in our courts; law requires diligence on part of clients and attorneys and mere neglect of either will not enable party to relief on that ground. Vacek v. Marburger ---------- 180
5. Words "arising out of" refer to origin or cause of accident and descriptive of its character, while words "in the course of" refer to time, place, and circumstances of accident. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
6. Referential and qualifying words in statute, where

no contrary intention appears, refer solely to last antecedent. Haiar v. Kessler ---------- 312
7. Issue means first delivery of an instrument to a holder or a remitter. State of Kansas v. Holeb ---- 319
8. Delivery means voluntary transfer of possession. State of Kansas v. Holeb ---------- 319
9. Tax not assessment of benefits; is means of distributing burden of cost of government; only benefit to which taxpayer consequently entitled that derived from his enjoyment of privileges of living in organized society, established and safeguarded by devotion of taxes to public purposes. Sandberg v. State ---------- 335
10. Terms and provisions which control in construction of coverage afforded by temporary insurance "binder" those contained in ordinary form of policy usually issued by company at that time upon similar risks. Robinson v. State Farm Mut. Auto. Ins. Co. ------ 470
11. Woman who is chaste is one who has never had unlawful sexual intercourse with male person; act of sexual intercourse without consent and against her will if she is capable of consent does not destroy her chastity. State v. Brionez ---------- 488
12. Words "in the event of death," "in case of death," or "at his death" do not have effect of postponing vesting of estate in remainder to time of death of life tenant. Rudy v. Wagner ---------- 508
13. Crime of embezzlement of public money as defined by cited statute applies only to officers or persons charged by law with performance of duties therein mentioned, and police patrolman collecting coins from parking meters as part of duties designated by his superior cannot properly be informed against thereunder. State v. Williams ---------- 565
14. Contract carrier one, other than common carrier, which furnishes transportation service to meet special needs of individual shipper or shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584
15. Although "conduct" may entail some elements of expression or speech, when "speech" and "nonspeech" elements combined in same course of conduct, a sufficiently important governmental interest in regulating nonspeech element can justify incidental limitations on First Amendment freedoms. Major Liquors, Inc. v. City of Omaha ---------- 628

16. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha -- 628
17. Neglected child is child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of fault or habits of parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for health, morals, or well-being of such child. Healey v. Hartman ---------- 682
18. Words "slight" and "gross" as employed in comparative negligence act comparative terms; test statute provides detailed. Johnson v. Roueche ---------- 716
19. Meaning of gross negligence under comparative negligence rule not same as meaning of gross negligence under guest passenger statute. Johnson v. Roueche ---------- 716

Workmen's Compensation.

1. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
2. Test usually employed in this state to determine whether relationship of master and servant exists whether alleged employer has control of workman and of details, mode, and manner of doing work. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
3. Words "arising out of" refer to origin or cause of accident and descriptive of its character, while words "in the course of" refer to time, place, and circumstances of accident. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
4. Whether accident arises out of and in course of employment must be determined by facts of each case; no fixed formula by which question may be resolved. Johnson v. Hahn Bros. Constr., Inc. ---- 252
5. In determining whether risk arises out of employment, test to be applied to any act or conduct of employee which does not constitute direct performance of his work whether it is reasonably incident thereto or so substantial a deviation as to constitute break in employment and to create formidable inde-

pendent hazard. Johnson v. Hahn Bros. Constr., Inc. 252
6. In workmen's compensation case, burden of proof on defense of intoxication on employer. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
7. Where have been two injuries to employee, question of whether disability sustained by him should be attributable to first or second depends on whether or not disability sustained caused by original injury or by independent intervening cause. Breed v. Interstate Glass Co. ---------- 284
8. Where first injury not proximate cause of disability, second injury constitutes independent intervening cause. Breed v. Interstate Glass Co. ---------- 284
9. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that personal injury sustained by employee, arising out of and in course of his employment. Breed v. Interstate Glass Co. ---------- 284
10. On appellate review of workmen's compensation case in Supreme Court, cause not considered de novo unless findings of fact not supported by evidence as disclosed by record. Swartz v. Hess, Inc. ---------- 542
11. Unreasonable to conclude that injury not latent merely because plaintiff suffered pain, when thereafter several physicians unable to correctly diagnose his injury. Borowski v. Armco Steel Corp. ------ 654
12. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. ---------- 654
13. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Borowski v. Armco Steel Corp. 654

Zoning.

Where certificate of occupancy properly obtained in accordance with zoning statutes and ordinances, may not be arbitrarily revoked where certificate holder has incurred substantial expenses, commitments, and

obligations in good faith reliance upon certificate.
A. C. Nelson Enterprises, Inc. v. Cook ---------- 184